Bay Harbour Electric, Inc. *and* Chris Watkins and International Brotherhood of Electrical Workers, Local No. 306, AFL–CIO. Cases 6–CA–32166, 6–CA–32167, 6–CA–32343, and 6–CA–32434

September 30, 2006

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On November 25, 2002, Administrative Law Judge David L. Evans issued his decision in this proceeding. The Respondent, the General Counsel, and the Charging Party Union filed exceptions, supporting briefs, and answering briefs, and the Respondent and the General Counsel filed reply briefs.

On September 29, 2006, the Board issued its decisions in *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (206), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). *Oakwood Healthcare, Golden Crest*, and *Croft Metals* specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has decided to remand this case to the judge for further consideration in light of *Oakwood Healthcare, Golden Crest*, and *Croft Metals*, including allowing the parties to file briefs on the issue and, if warranted, reopening the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare*, *Golden Crest*, and *Croft Metals* framework.

IT IS ORDERED that this proceeding is remanded to the administrative law judge[1] for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand.

Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Barton A. Myers, Esq., for the General Counsel.
Kurt A. Powell and *Keith Coates Jr., Esqs.,* of Atlanta, Georgia, for the Respondent.
Bryan O'Connor, Esq., of Cleveland, Ohio, for the Charging Party, Local No. 306.

DECISION

I. STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Cleveland, Ohio, on May 7–10 and May 29–30, 2002. On May 2, 2001, Chris Watkins, an individual, filed with the National Labor Relations Board (the Board) the charge in Case 6–CA–32166 against Bay Harbour Electric, Inc. (the Respondent). On May 2, October 5, and November 30, 2001, International Brotherhood of Electrical Workers, Local No. 306, AFL–CIO (the Union), filed charges against the Respondent in Cases 6–CA–32167, 6–CA–32343, and 6–CA–32434, respectively. Each such charge alleged that the Respondent has engaged in unfair labor practices as set forth in the Act. Upon an investigation of those charges, the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the Act by threatening employees with denial or loss of employment because they had engaged in activities on behalf of the Union and that the Respondent had violated Section 8(a)(3) of the Act by refusing to hire, and by refusing to consider for hire, nine employee-applicants because they were members of the Union. The Respondent duly filed an answer admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[1] and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

II. JURISDICTION AND LABOR ORGANIZATION'S STATUS

As it admits, at all material times, the Respondent has been a Pennsylvania corporation with an office and place of business in Erie, Pennsylvania (the Respondent's Erie facility), where it has been engaged in the building and construction industry as an electrical contractor. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting those business operations, performed services valued in excess of $50,000 outside Pennsylvania. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the

[1] Judge Evans has retired from the Agency. Accordingly, the chief administrative law judge is requested to ascertain the availability of Judge Evans. In the event Judge Evans is not available, the case is remanded to the chief administrative law judge, who may designate another administrative law judge in accordance with Sec. 102.36 of the Board's Rules and Regulations.

[1] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked . . . ." When quoting exhibits, I have retained irregular capitalization, but I have corrected certain *meaningless* grammatical errors rather than use "[sic]." All bracketed entries have been made by me.

Act. As the Respondent further admits, the Union is a labor organization within Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Contentions

The Respondent employs electricians (sometimes called field employees), none of whom is represented by a labor organization. A passage in the Respondent's handbook states: "We believe that labor unions have no place at BHE." The handbook adds: "Our Company will use all lawful means at its disposal to strongly resist any labor union that tries to intrude into the relationship between our Management and our employees."

The Respondent's only office is in Erie, but in 2000 it began operations in Ohio. In late October and early November, the Respondent placed several advertisements in Ohio newspapers for "supervisor/foreman" (and "supervisors/foremen") and apprentices. From November 3 through January 18 (the November-to-January period), the Respondent hired 11 individuals as foremen, none of whom was a member of a labor organization. Nine members of the Union applied for employment with the Respondent during that period; the Respondent hired none of them, and each is named as an alleged discriminatee in the complaint. Specifically, the complaint alleges that, in violation of Section 8(a)(3):

> 11. Since about October 2000, Respondent has refused to hire or consider for hire job applicants: Richard Aikey, Robert Beltz, Michael Kammer, Paul Stefano, Aldo Tersigni, Robert Sallaz, Bently Hudson, James Beltz and Stephen Stock, at a time when Respondent had openings available and filled positions for which said applicants were qualified, and since said date, has failed and refused to employ said applicants.
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> 12. Since about May 2001, Respondent has refused to hire or consider for hire job applicants Bentley Hudson and Stephen Stock (who renewed their applications at that time), at a time when Respondent had openings available and filled positions for which said applicants were qualified, and since said date has failed and refused to employ said applicants.

As well as being union members, all nine alleged discriminatees are members of its organizing committee, and they applied for employment with the intent of assisting the Union in its efforts to organize the Respondent's work force. That is, each union applicant was a salt, and this is a salting case.[2] As evidence of unlawful motivation, or animus, against the salts' union affiliations which caused the Respondent not to hire them, or to consider them for hire, the General Counsel relies upon the above-quoted language of the Respondent's employee handbook, and the General Counsel relies upon several alleged statements by the Respondent's managers, which statements allegedly violated Section 8(a)(1).

The Respondent denies that the alleged 8(a)(1) incidents occurred, and it denies that its handbook's statements and its managers' alleged statements are evidence of unlawful animus. The Respondent admits that it refused to consider for employment any of the alleged discriminatees because of their union statuses. It contends, however, that the alleged discriminatees only applied for its open foremen's positions, that those positions were those of supervisors under Section 2(11) of the Act, and that its refusals to hire or consider the alleged discriminatees was therefore not unlawful.[3] The Respondent further contends that the 11 individuals whom it did hire during the November-to-January period became, or were intended to become, supervisors within the meaning of Section 2(11) of the Act. The General Counsel contends that the foremen's positions which the Respondent advertised as open were not actually those of statutory supervisors and that the Respondent's contention is nothing more than a subterfuge employed to avoid hiring the alleged discriminatees, or any other union members, as journeymen.

Section 8(a)(3) prohibits discrimination against employees who seek employment as employees.[4] The Act does not, however, protect those applying for employment as a supervisor under Section 2(11).[5] Such titles as "foreman" notwithstanding, the issue is whether the positions applied for are those of employees or supervisors. Section 2(11) of the Act defines "supervisor" as: . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Moreover, it is well established that, because Section 2(11) is written in the disjunctive, the possession of only one of the indicia is sufficient to confer supervisory status on an individual.[6]

The General Counsel concedes that an employer's failure to hire an applicant for a supervisory position because of that applicant's union membership or sympathies does not violate the Act. The General Counsel, however, contends that, although Respondent did classify the 11 individuals whom it did hire as "foremen," those individuals were not actually supervisors within the meaning of Section 2(11). The General Counsel therefore seeks the conclusion that the Respondent's preference

[2] As stated by the Board in *Aztech Electric Co.*, 335 NLRB 260 fn. 4 (2001): "'Salting a job' is the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees. A 'salted' member or 'salt' is a union member who obtains employment with an unorganized employer at the behest of his or her union so as to advance the union's interests there."

[3] At Tr. p. 597, the Respondent's counsel stated: "We have stated, and will state, that the reason that we denied those union applicants for those supervisory positions was because of their union status."

[4] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 185 (1941).

[5] *Pacific American Ship Owners Assn.*, 98 NLRB 582 (1952); *Ace Machine Co.*, 249 NLRB 623 (1980). Of course, an employer's refusal to promote an already-hired employee to a supervisory position because of his or her union membership or past protected activities is an entirely different matter.

[6] *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994).

for 9 of the 11 nonunion individuals whom it did consider and hire as foremen during the November-to-January period, over the 9 alleged discriminatees, violated Section 8(a)(3). (And, as previously noted, the complaint alleges that the Respondent further violated the law when Stock and Hudson later made reapplications.)

The Respondent's field operations are conducted on construction-site jobs that are overseen by its project managers. Project managers, who may have responsibilities for several different jobs, visit the jobs with an indeterminate frequency. (None of the project managers testified.) On each job there is one foreman-in-charge (or "main foreman" or the foreman who "runs the job"). Also on the Respondent's jobs are sometimes individuals whom the Respondent classifies as foremen but who are not the foremen-in-charge. The subordinate foremen (as I shall call them) are sometimes responsible for crews working in separate areas of a job, and the Respondent contends that, when they are, they have all of the authorities of the foremen-in-charge. And other individuals on a job may be classified as foremen, but they are not responsible for anyone but themselves. The Respondent contends, however, that all of those whom it classifies as foremen are actual, or at least potential, supervisors under Section 2(11). All foremen, whether foremen-in-charge or otherwise, are "working foremen"; that is, they work for 6 or 7 hours a day with their tools. When acting as a foreman-in-charge, a foreman receives a 5-percent premium above his regular hourly rate. Other foremen on a job receive no premium for their status.

The Respondent's president is Jeff Anthony. For about 8 years, the Respondent's director of human resources has been Sherry (Brink) Savoia. For several years ending in March 2001, Tim Delon was the Respondent's "director of education and corporate recruiter." Until Delon's departure, Savoia and Delon shared the interviewing and hiring responsibilities for the Respondent. Thereafter, Savoia handled the duty alone. (Savoia testified; Anthony and Delon did not.)

B. Evidence Presented by the General Counsel

1. Evidence of coercive statements

Watkins' Testimony. On November 7, 2000,[7] Charging Party Watkins (who is not an alleged discriminatee) applied for employment with the Respondent. On his application, in the space for "Position applying for," Watkins wrote "Journeyman Electrician." On December 29, Delon hired Watkins, but as an apprentice rather than a journeyman. Watkins testified that, also on December 29, Delon conducted an employee orientation meeting. (Two other new-hires were also present, but Watkins did not know their names.) According to Watkins, as well as discussing with the new-hires topics such as wages, Delon, "stated that Bay Harbour was a nonunion company and always would be a nonunion company. If anybody was a salt, organizer, or otherwise affiliated with the Union, they would find out about it and deal with it at that time." Based on this testimony by Watkins, the complaint alleges that the Respondent, by Delon, in violation of Section 8(a)(1): "informed employees that Respondent would always be nonunion and threatened unspecified reprisals against any employee who engaged in union activity."

Watkins further testified that on March 20, he attended an employees' orientation meeting that Savoia conducted. Watkins testified that during this meeting:

> [Savoia] told us that it was a nonunion company. And that they would do anything within the law to remain a nonunion company. And they showed a movie, "Little Card, Big Trouble." . . . [The movie] basically was telling you that if you signed a union card for representation that it would end up being nothing but trouble for you and the Company.

The General Counsel contends that Savoia's statements, and the showing of the video, constitute evidence of unlawful animus, but the complaint does not allege that either the statements or the showing independently violated Section 8(a)(1). Savoia testified for the Respondent. (In fact, she was the Respondent's principal witness.) Savoia admitted that during orientation sessions she told new employees that "the Company feels it's in the best interest of the Company and the employees to remain nonunion, and we will do anything in our legal power to remain a nonunion company." (The Respondent discharged Watkins on April 9, but that discharge is not alleged to be a violation of the Act.)

Albano's testimony. Vincent Albano, a journeyman electrician and a longtime union member, has never been employed by the Respondent, and he is not an alleged discriminatee in this case. Albano did, however, attempt to secure employment with the Respondent, and the General Counsel introduced his testimony about that attempt in support of certain 8(a)(1) allegations of the complaint.

John Chisholm, who did not testify, was a project manager at the time of Albano's attempt to secure employment with the Respondent, and he remained in the Respondent's employment as a project manager at time of trial.[8] Albano testified that, beginning in December, he approached Chisholm several times to ask for employment with the Respondent. All of these approaches were made at the Erie Civic Center's Tulio Ice Arena (the Erie Ice Arena) where he and Chisholm regularly (but separately) attended hockey games. The complaint alleges that on two of those occasions, in violation of Section 8(a)(1), Chisholm threatened Albano that he would not be hired by the Respondent because of his union membership.

Albano testified that he first spoke to Chisholm about employment with the Respondent on December 16. Albano testified that Chisholm then

> . . . said that they were busy at the time and . . . he said, "Well, if you went down to apply for a job, I don't think they'd hire you because you're a union electrician." But he did say, "I will put a good word in for you, and if you can call this guy, Tim Delon; maybe he can help you out."

[7] Unless otherwise indicated, all dates mentioned below are from July 1, 2000 until June 30, 2001.

[8] The complaint alleges, and the Respondent admits, that Chisholm was its supervisor "[a]t all material times." Moreover, Robert Ockuly, whom the Respondent contends is a supervisor, and whom the Respondent called as its witness, testified that Chisholm "is" one of the Respondent's project managers.

Albano further testified that Delon added that Jeff Anthony, the Respondent's president, "don't like to hire union electricians." Based on this testimony by Albano, the complaint alleges that the Respondent, by Delon, in violation of Section 8(a)(1), "informed a job applicant that Respondent preferred not to hire applicants who are union affiliated."

On December 18, Albano called Delon who told Albano to bring his resume to the Respondent's Erie office, which Albano did on the same day (without speaking to Delon). On January 30, Delon called Albano to come in to take some tests. On January 31, after Albano had completed part of a written test, Delon and Savoia came into the room. Further according to Albano:

> And then they sat down across the table from me, and Sherry asked me why I wanted to work for Bay Harbour, and I says I needed a job. . . . And she says, "Well, when the union guys come here, they take our men away from us." And I told her I wasn't here to cause any problems; I just needed a job. . . . Tim told me to come in the next day and finish the test.

Based on this testimony by Albano, the complaint alleges that the Respondent, in violation of Section 8(a)(1), by Savoia and Delon, "informed employees that the Respondent was opposed to hiring union-affiliated employees."

On February 1, Albano returned to finish the written test, and on February 2, he completed a "hands-on" test which Joe Sullivan, the Respondent's "Safety Compliance Officer," reviewed.[9] Albano testified that Sullivan "said I did good, and he said that . . . he thought they were going to hire me, and he said that they would [notify] me that evening by telephone." Further according to Albano, during the weekend of February 2–3, Delon told him that he would hear from the Respondent shortly that he had, in fact, been hired. Hearing nothing by mid-February, however, Albano called Delon. Delon then told him: "Your test wasn't no good, and we don't need any journeyman at this time. You applied for a foreman's job and your scores weren't good enough." Albano testified that he made no further attempts to call Delon.

Joseph Dobrich is a residential electrical contractor in Erie. Albano testified that on April 24 he met Dobrich at a restaurant in Erie and asked Dobrich to help him get work with the Respondent. Dobrich agreed to call Anthony on Dobrich's cell phone. After dialing and getting Anthony on the phone, Dobrich held the receiver away from his head so that Albano could hear both sides of the conversation. According to Albano:

> Joe said, "I have a friend of mine sitting here. His name is Vinnie Albano. He's looking for work. He had seeked employment at your place earlier but he didn't get hired. He's [a] union electrician." And I heard Anthony say in reply to him, "I don't want any ties with this guy. If you want to hire him, hire him; you hire him and we'll sub him out through you. I don't want any direct ties with this guy. . . . And Joe says, "Well, what should I do?" And he [Anthony] says, "Call Sherry [Savoia] and work it out with her. . . . I don't want any ties with this guy because he's a union electrician."

Based on this testimony by Albano, the complaint alleges that the Respondent, by Anthony, in violation of Section 8(a)(1), "by telephone, told employees [that] Respondent would not directly employ applicants who are affiliated with the Union." (Dobrich did not testify.)

Albano further testified that on April 25, he again met with Chisholm. According to Albano, Chisholm said that "they won't hire me because I'm a union electrician, directly to Bay Harbour." Based on that testimony by Albano, the complaint alleges that the Respondent, by Chisholm, in violation of Section 8(a)(1), "informed a job applicant he had not been hired because he was affiliated with the Union."

Albano further testified that: "Joe Dobrich had called me in the middle of May and told me that he had set something up with Bay Harbour and himself. They were going to sub me out to them, and if I wanted to work I could start at the Uruguay High School [project] the next day." Albano did begin working at the Uruguay High School project the next day. Albano testified that there were other electricians on the project, all of whom were employed by the Respondent. He and the other electricians reported to the Respondent's Foreman Ron Eaton. On June 5 or 6, Albano wore a union T-shirt to the project for the first time. On June 8, a payday, Albano went to Dobrich to collect his check. Dobrich told Albano that Savoia had just called him and told him to discharge Albano, which Dobrich then did.

On cross-examination, Albano admitted that he was applying for "a foreman's position" when he spoke to Delon. Albano further admitted that one Ron Sciarrilli was present at each meeting between himself and Chisholm at the Erie Ice Arena. (Although the Respondent did not call Chisholm to testify, it did call Sciarrilli, as discussed infra.)

Other testimony of coercive statements. As discussed below, during one employment interview Delon told alleged discriminatee Stock that he would not be hired because he was a union organizer, and in another interview Delon told prospective foreman Milton Zill that he would be hired but he would not be allowed to organize employees. The complaint alleges both these remarks violated Section 8(a)(1). The Respondent does not dispute that Delon made the remarks; it contends, however, that Delon's remarks did not violate the Act because Delon was interviewing Stock and Zill only for supervisory positions.

2. Evidence of discrimination

a. Testimony of the alleged discriminatees

All nine of the alleged discriminatees were called as witnesses by the General Counsel: (1) Stock has been a full-time, paid organizer for the Union since July 1998. Before he became an organizer for the Union, he worked in the building and construction industry as a journeyman electrician doing commercial and industrial work. Between July 1998 and time of trial, Stock was not employed as an electrician in any capacity. Stock identified an advertisement in the October 22 *Akron Bea-*

[9] Sullivan, who did not testify, is not alleged by the complaint to be a supervisor. The Respondent, however, did not object to the General Counsel's testimony about his conduct and, on brief, the Respondent acknowledges that Sullivan was one of the "Bay Harbour management employees."

con Journal that had been placed by the Respondent. The advertisement stated:

> ELECTRICAL CONSTRUCTION SUPERVISOR/ FOREMAN (M–F) AND APPRENTICES
>
> Bay Harbour Electric is rated as one of the top 200 electrical contractors in the United States. Career opportunities exist for supervisors/foremen (M–F) with a minimum of 3 years' commercial and/or industrial supervisory experience. . . . Applications are by appointment only. Call [toll-free telephone number, with extension]. NO WALK-INS, E-MAILS OR FAXES WILL BE ACCEPTED. EOE.

On October 23, Stock telephoned Delon who took from Stock the information that he had had 20 years' experience in the electrical industry doing commercial and industrial work. Delon told Stock that he was then busy and could not talk more at that time but that he would call Stock back. Delon did not call Stock back. (Stock did not testify that he mentioned his union status in this October telephone conversation with Delon.)

Stock identified another advertisement that the Respondent placed in the *Akron Beacon Journal* on November 5. The text was the same as that quoted above. Stock called Delon on November 6. Delon asked Stock where he was working, and Stock replied, "out of Local Union 306." Delon asked Stock to fax his resume to the Respondent. On November 7, Stock faxed to the Respondent a 1-page resume that first stated: "OBJECTIVE. Seeking full time employment as an Electrician/foreman with a reputable merit shop electrical contracting company." (Stock testified that "merit shop" is a term that contractors in the industry use to indicate that they are nonunion; this testimony was not disputed.) The body of the resume listed Stock's work experience from "1998 through present" as "Organizer, IBEW, Local Union #306." Stock got no response.

On December 1, after seeing a third newspaper advertisement by the Respondent for "supervisors/foremen," Stock again called Delon. According to Stock:

> When I asked him about my resume and if I could make an application to Bay Harbour Electric, he proceeded to tell me that, even though my skill levels and my years of experience would make me qualified for the job that, because I was [a] union organizer, they would not be able to consider me . . . that being in a supervisory position and an organizer would be a conflict of interest, and that they were not interested at this time. . . .
>
> I said that I was just looking for a job as an electrician.
>
> And he stated that they were looking for foremen . . . and he repeated that they were just not interested at this time.

Based on this testimony by Stock, the complaint alleges that the Respondent, by Delon, in violation of Section 8(a)(1), "informed an applicant that he would not be considered for employment because of his union membership and activity."

Stock made no further attempts to contact the Respondent until May 17 when he attempted to telephone Delon. A secretary told Stock that Delon was no longer employed by the Respondent and that he should speak to Savoia. After repeated attempts, Stock reached Savoia on May 22. Savoia told Stock to come for an interview the next day. On May 23, Stock appeared at Savoia's office wearing a shirt that had a prominent display of the Union's logo (and at which, Stock testified, Savoia appeared to stare). Savoia gave Stock an application to complete. In the application's space for "Position applying for," Stock wrote: "Electrician/Foreman." As previous work experience, Stock listed several companies, going back to 1994, for which he had worked as an "Electrician/Foreman." For his current employment, Stock listed the Union's full name and telephone number; he completed a space for "Primary Duties" with: "Union Organizer." Stock gave his completed application to Savoia who said that she would "be in touch."

On June 1, after hearing nothing from Savoia, Stock wrote her inquiring about the status of his application "for employment as a journeyman wireman/foreman." Savoia, by return mail, replied:

> Thank you for your application for employment with Bay Harbour Electric, Inc. You indicated that you are seeking a position as a foreman. After review of your application, I have decided your qualifications do not suit our needs as a foreman at this time.

On June 6 and 18, Stock wrote Savoia asking how he had failed to meet the Respondent's needs and enclosing more copies of his resume. Also, in the June 6 letter Stock added: "I am also willing to work for Bay Harbour Electric as a journeyman wireman." And in the June 18 letter, Stock added: "I am willing to work for Bay Harbour in any field position. I believe my job skills and experience would make me more than qualified for any job opening from an apprentice to a foreman." Savoia did not reply to either letter.

On cross-examination, Stock acknowledged that he had actually had no supervisory experience, and he agreed that, during the December 1 telephone conversation with Delon, Delon told him that the Respondent did employ "working foremen," but "the Company viewed a foreman as being in management, and that there was a conflict of interest being presented if you were an organizer." Stock further admitted that, had he been hired by the Respondent as a foreman he would have engaged in organizational activities, but only on nonworking time. Stock further agreed that the other alleged discriminatees in this case are union members whom he solicited to seek employment with the Respondent and to assist him in organizing its employees; Stock also acknowledged that all of the other alleged discriminatees are also members of the Union's organizing committee.

(2) Aikey testified that he answered the Respondent's newspaper advertisement for "supervisors/foremen" by calling Delon on November 29. Aikey told Delon that he had 8 years of residential electrical experience, much of it supervising. Delon asked where Aikey had gotten his training; Aikey replied that it had been partially with the IBEW. Delon asked Aikey to fax his resume to the Respondent, and Aikey did so within the week. The resume showed extensive supervisory experience in the field; the first item that Aikey listed in a section captioned "Experience" was the Union's name, in boldfaced type. After submitting the resume, Aikey made several telephone calls to Delon to further inquire about his application, but his calls were

not returned. On cross-examination, Aikey admitted that he was applying to the Respondent for "a supervisory position with Bay Harbour."

(3) Kammer has been an electrician for 22 years, and he has had some experience in the electrical industry "as foreman and general foreman." On November 29, Kammer went to the Respondent's web site; then he went to a link to the Respondent's e-mail and he sent to the Respondent a copy of his resume as an attachment. As well as stating his supervisory experience, the e-mail stated that Kammer's "Experience" included "working out of IBEW Local 306," and his "Education" included the Union's apprenticeship program.[10]

Kammer testified that, having heard nothing from the Respondent for about a week after he sent his e-mail, he called and left the following voice-mail message: "This is Mike Kammer, Local 306. I'm calling in response to your advertisement in the Akron Beacon Journal. I e-mailed my resume, and you can reach me at my phone number, [number given]." Kammer got no response and, he testified, he called the Respondent's voice mail three more times during the next 2 weeks; each time he left the same message, including the reference to Local 306. Kammer got no responses from these efforts either. When asked what position he had been applying for, Kammer replied: "I believe that ad was for a supervisory position as an electrician."

(4) Stefano became a journeyman electrician in May 2000. He has had no supervisory experience. On December 13, after Stock showed him the Respondent's newspaper advertisement for "supervisor/foreman," Stefano called the Respondent's office. He got only as far as Delon's voice mail; he left his name and telephone number and stated he was "looking for work in the area" and asked for a return call. Stefano received no response. On December 15, as Stefano further testified, he called the Respondent's voice mail with the same message, plus "I informed them that I was an unemployed IBEW member, that [I] was seeking employment in the area, and [that] I had heard that they had work in the area." Again, Stefano received no response. On December 16, Stefano repeated his message of December 15; again, he received no response.

(5) Tersigni, who has been an electrician since 1979, has had some supervisory experience. Tersigni testified that on November 2, after he had seen the Respondent's advertisement for "supervisor/foreman," he called Delon and asked if he could fill out an application. Delon asked if Tersigni had any supervisory experience and Tersigni replied that he had "run . . . a crew [of] about, like eight guys." Delon told Tersigni that the Respondent was not then accepting applications. Tersigni testified that, hearing nothing further from Delon, he called the Respondent twice again during the next 2 weeks; he was routed to Delon's voice mail; Tersigni testified that his only message was to identify himself as the caller; Tersigni did not testify that he mentioned his union status. On cross-examination, Tersigni admitted that when he called Delon he was "trying to get [a] supervisor position."[11]

(6) Sallaz has a degree in management, and he was a supervisor of the City of Akron's electrical inspection department for 17 years. Sallaz testified that in November, after seeing the Respondent's advertisement for "supervisors/foremen," he decided to apply "for a supervisor's position." Sallaz testified that he called the Respondent's office and reached some unnamed person who told him to submit a resume. Sallaz did send a resume (dated December 10) to the Respondent; in it he lists substantial supervisory and journeyman experience, and he states that since 1994 he has been a member of "IBEW LU #306." In a cover letter for the resume, Sallaz stated that he was applying for "supervisory employment" with the Respondent. Sallaz got no response.

(7) Hudson is an electrician with 34 years' experience. In November, after conferring with Stock and seeing the Respondent's newspaper advertisements for "supervisor/foreman," Hudson called the Respondent several times. Hudson testified that he never got "a human being," but he left voice-mail messages each time. He stated a short resume; Hudson did not testify that in those oral resumes he listed either his union membership or any supervisory experience. Hudson got no responses from his voice-mail messages.

Hudson further testified that he saw the Respondent's advertisement again in late May. He called Savoia and told her "that I was calling regarding the ad; I was looking for a job as a foreman slash supervisor, [and] briefly ran across my experience." Savoia, according to Hudson, invited him to come to the Respondent's office the next day to "fill out an application and give me a personal interview." Hudson testified to no mention of his union membership in that telephone conversation. On June 8, Hudson wore an IBEW T-shirt to the Respondent's office. Savoia gave Hudson an application which he completed. In the "Position applying for" space, Hudson wrote "foreman." Hudson also listed 5 employers for whom he had worked as a "supervisor." When Savoia collected Hudson's application, she told him that "We're not looking for anybody right now, but we'll give you a call." Savoia did not thereafter call Hudson.

(8) Beltz has been a member of the Union since 1967. Beltz has been steadily employed by Loomis Electrical Contractors, a union contractor in the Akron area, since 1971. Much of Beltz' employment with Loomis (which continued through time of trial) was as a supervisor. Beltz testified that on November 7, after seeing the Respondent's newspaper advertisement for "supervisor/foreman," he telephoned the Respondent. A person named Tim (apparently Delon) answered the telephone; Beltz told Delon that he was seeking employment as a foreman. Delon asked what Beltz' job experience was, and Beltz told Delon about his working for Loomis. Delon replied that he had never heard of Loomis, but he also told Beltz to mail a resume to the Respondent's office in Erie; Beltz testified that he did so

[10] Kammer testified that he sent the e-mail on November 13; however, the Respondent produced a copy of the e-mail which shows that it was actually sent on November 29.

[11] Tersigni submitted a resume to the Respondent in April 2001, and that resume did mention his union affiliation; however, the complaint does not allege that the Respondent violated the Act by not hiring Tersigni pursuant to his submission of his April resume.

on November 8. On December 20, having heard nothing from the Respondent, Beltz telephoned "Tim" again. Beltz asked Delon what his chances of being hired were; Delon said that he had not received Beltz' resume; Beltz responded to Delon that he had, in fact, sent it; Delon told Beltz that the Respondent was not then hiring anyway. Delon testified that he has not since heard from the Respondent. On cross-examination, Beltz admitted that he did not know if the Respondent received his resume; no copy of whatever Beltz may have mailed to Delon was offered in evidence.

(9) Beltz has worked approximately 37 years in the electrical trade, including some experience as a supervisor. Beltz testified that in early December, at the urging of union organizer Stock, he called the Respondent's place of business to seek employment. Beltz was placed through to "a gentleman named Tim" (apparently Delon). Beltz asked Delon for an application for employment "as an electrician." Delon asked Beltz if he was working at the time; Beltz replied that he was then working for Hersh Electric Company. Delon replied that the Respondent was not then accepting applications but that he would take Beltz' name and telephone number. Beltz further testified that, after he had heard nothing by late January, he called the Respondent again. He was placed through to Delon's voice mail. Beltz left a message that he had not heard from the Respondent and that he wanted Delon to send him an application. Beltz again left his name and telephone number. Beltz got no reply. Beltz testified that he had not seen the Respondent's advertisement for "supervisor/foreman" but that he would have accepted employment either as a supervisor or a journeyman. Beltz did not testify that in either his November or January calls he expressly mentioned his union affiliation, but he did testify that Hersh was a union contractor in Cleveland and Akron. On cross-examination, however, Beltz agreed that he did not know if Delon (whose office was in Erie) knew that Hersh was a union contractor. On cross-examination, Beltz denied that he told Delon that he was seeking work as a foreman (or supervisor), and he insisted that he told Delon only that he was applying for work as "an electrician."

Beltz' testimony that is described in the preceding paragraph was given on the fifth day of trial. On the third day of trial before he rested, the General Counsel represented that Beltz was one of his scheduled witnesses but Beltz was undergoing a personal emergency. The General Counsel therefore requested to be allowed to rest, subject to the later calling of Beltz out of order. The Respondent graciously agreed. Later during the same day of trial, I expressed extreme skepticism about the possibility of merit to the General Counsel's Section 8(a)(3) cases because each of the alleged discriminatees (except Stock) had testified that he had applied for work only as a "supervisor" or "foreman." An extensive discussion then ensued which ended with:

> JUDGE EVANS: I mean you don't have any more alleged discriminatees to testify, except one. I'd be real[ly] suspicious [if], after this colloquy, you brought him in and [he] testified otherwise, but your other witnesses said they were applying for supervisory positions.

Sure enough, Beltz thereafter appeared on the fifth day of trial and testified that he had not told Delon that he was applying for the "supervisor/foreman" job that the Respondent had advertised and that he was applying only for a job as "an electrician."

Although Delon did not appear to deny Beltz' testimony, I do not credit it. Stock testified that he encouraged all of the alleged discriminatees (presumably including Beltz) to respond to the Respondent's advertisement for "supervisors/foremen." And Beltz admitted that Stock had encouraged him to apply. It is too much to believe, and I do not believe, especially in view of the referenced "colloquy" at trial, that Beltz was testifying honestly on this point. I find that Beltz told Delon that he was responding to the Respondent's advertisement for "supervisors/foremen" and that he was seeking employment as such. (It appears that the General Counsel and the Charging Party also disbelieve Beltz' denial that he told Delon that he was applying for the advertised "supervisors/foremen" jobs; neither party mentions that denial on brief.)

b. Testimony of individuals who were hired as foremen

The General Counsel called three individuals whom the Respondent hired as foremen during the November-to-January period: (1) John Switzer was employed by the Respondent as a "foreman, slash, supervisor" (Switzer's words) from December 2000 until February 2002. On November 21, after seeing the Respondent's newspaper advertisement for "supervisors/foremen," Switzer telephoned Delon seeking an appointment. After briefly discussing Switzer's job experience (which included about 10 years of maintenance and residential electrician's work and 5 years of supervisory experience, but outside the electrical industry), Delon asked Switzer to come to the Respondent's office and complete an application.

On November 22, after Switzer completed an application, Delon handed him two test forms; one was on electrical work and one was a "supervisory test." Switzer finished the electrical test first; he then started the supervisory test, but he did not finish it because Delon came into the room and said that he had reviewed Switzer's answers to the electrical test, said that he was satisfied with Switzer's answers on that test, and then "started talking about Bay Harbour policies and what they had to offer." Delon offered Switzer $16.50 per hour to start immediately, first as "right-hand man" to a foreman and then as a foreman himself. Switzer agreed.[12]

Switzer testified that on December 1, he attended a foremen's orientation meeting at the Respondent's office, which meeting was attended by other individuals who had been recently hired as foremen. Switzer testified that at that meeting the Respondent showed the video entitled "Little Ticket, Big Trouble." The theme of the video, according to Switzer, was that union authorization cards caused troubles between employees who did, and did not, sign them. (Apparently this was the same video that Watkins described, although Watkins testified that the title was "Little Card, Big Trouble." The Respondent

[12] Within a month, the Respondent raised Switzer's hourly rate by $1, but this was granted as compensation for the distance that Switzer then had to drive to his assignments, not an increase in Switzer's basic pay rate.

offered no evidence about the video, including evidence of what its exact name was.)

On December 4, Switzer began working at different jobs that the Respondent then had going. On all of these jobs, Switzer testified without contradiction that he did only journeyman electrician's work; he never did work, or took any responsibilities, that the Respondent argues to be supervisory.

In late April or early May, or about 5 or 6 months after the Respondent hired Switzer, Savoia sent to Switzer a form entitled "Conditional Offer of Employment for Apprentice Electrician." Savoia attached a handwritten note stating: "It seems as though you never signed this form at orientation. Please sign and return to me." The form states that the named employee (in this case, Switzer) understood that he was being offered a job as an apprentice (not as a foreman), subject to his passing a physical examination. The form also has a boilerplate section entitled "Description of Essential Job Duties" which lists several functions of apprentices and concludes with: "Perform other routine duties as directed by experienced craft person." Switzer testified that after he reviewed the document he called Savoia; Switzer told Savoia that he had not been presented with the document for signing during his orientation and that, anyway, "At the interview 'electrical apprentice' was not even brought up." Switzer did not testify what reply, if any, that Savoia made.

On May 8, Savoia sent another memorandum to Switzer; it states: "Please read the enclosed job description; then sign and date the Job Description Acknowledgment Form and return it to me as soon as possible." Savoia's memorandum had two attachments. The first, the "Job Description Acknowledgment Form," stated "I have received, read and understand my duties and responsibilities at Bay Harbour Electric, Inc., for the position of. . . ." In a following space, Savoia had handwritten "apprentice electrician." Following that were spaces for "Employee Signature" and "Date." The attached apprentice's job description is 5 pages long; it includes the following in a section entitled "Competency":[13]

> To perform the job successfully, an individual should demonstrate the following competencies;
>
> *Analytical*—Uses intuition and experience to complement data.
>
> *Design*—Uses feedback to modify designs; Applies design principles; Demonstrates attention to detail.
>
> *Problem Solving*—Identifies and resolves problems in a timely manner; Gathers and analyzes information skillfully; Develops alternative solutions; Works well in group problem-solving situations; Uses reason even when dealing with emotional topics.
>
> *Project Management*—Completes projects on time and budget.
>
> *Technical Skills*—Assesses own strengths and weaknesses; Pursues training and development opportunities; Strives to continuously build knowledge and skills; Shares expertise with others.
>
> *Customer Service*—Manages difficult or emotional customer situations; Responds promptly to customer needs; Solicits customer feedback to improve service; Responds to requests for service and assistance; Meets commitments.
>
> *Interpersonal*—Focuses on solving conflict, not blaming; Maintains confidentiality; Listens to others without interrupting; Keeps emotions under control; Remains open to others' ideas and tries new things.
>
> *Oral Communication*—Speaks clearly and persuasively in positive or negative situations, Listens and get clarification; Responds well to questions.
>
> *Team Work*—Balances team and individual responsibilities; Exhibits objectivity and openness to others' views; Gives and welcomes feedback; Contributes to building a positive team spirit; Puts success of team above own interests; Able to build morale and group commitments to goals and objectives; Supports everyone's efforts to succeed; Recognizes accomplishments of other team members.
>
> *Written Communication*—Writes clearly and informatively; Able to read and interpret written information.
>
> *Leadership*—Effectively influences actions and opinions of others; Inspires respect and trust; Accepts feedback from others; Provides vision and inspiration to peers and subordinates.
>
> *Managing People*—Improves processes, products and services; Continually works to improve supervisory skills.
>
> *Quality Management*—Looks for ways to improve and promote quality; Demonstrates accuracy and thoroughness.
>
> *Business Acumen*—Understands business implications of decisions; Displays orientation to profitability; Demonstrates knowledge of market and competition; Aligns work with strategic goals.
>
> *Cost Consciousness*—Works within approved budget; Develops and implements cost saving measures; Contributes to profits and revenue; Conserves organization resources.
>
> *Diversity*—Demonstrates knowledge of EEO policy; Shows respect and sensitivity for cultural differences; Educates other on the value of diversity; Promotes a harassment-free environment; Builds a diverse workforce.
>
> *Ethics*—Treats people with respect; Keeps commitments; Inspires the trust of others; Works with integrity and ethically; Upholds organizational values.
>
> *Organizational Support*—Follows policies and procedures; Completes administrative tasks correctly and on time; Supports organization's goals and values; Benefits organization through outside activities; Supports affirmative action and respects diversity.
>
> *Strategic Thinking*—Develops strategies to achieve organizational goals; Understands organization's strengths & weaknesses; Adapts strategy to changing conditions.
>
> *Adaptability*—Adapts to changes in the work environment; Manages competing demands; Changes approach or method to best fit the situation; Able to deal with frequent change, delays, or unexpected events.

[13] Underlining and punctuation, as well as capitalization, are original.

Attendance/Punctuality—Is consistently at work and on time; Ensures work responsibilities are covered when absent; Arrives at meetings and appointments on time.

Dependability—Follows instructions, responds to management direction; Takes responsibility for own actions; Keeps commitments; Commits to long hours of work when necessary to reach goals; Completes tasks on time or notifies appropriate person with an alternate plan.

Initiative—Volunteers readily; Undertakes self-development activities; Seeks increased responsibilities; Takes independent actions and calculated risks; Looks for and takes advantage of opportunities; Asks for and offers help when needed.

Innovation—Displays original thinking and creativity; Meets challenges with resourcefulness; Generates suggestions for improving work; Develops innovative approaches and ideas; Presents ideas and information in a manner that gets others' attention.

Judgment—Displays willingness to make decisions; Exhibits sound and accurate judgment; Supports and explains reasoning for decisions; Includes appropriate people in decision-making process; Makes timely decisions.

Motivation—Sets and achieves challenging goals; Demonstrates persistence and overcomes obstacles; Measures self against standard of excellence; Takes calculated risks to accomplish goals.

Planning/Organizing—Prioritizes and plans work activities; Uses time efficiently; Plans for additional resources; Sets goals and objectives; Organizes or schedules other people and their tasks; Develops realistic action plans.

Professionalism—Approaches others in a tactful manner; Reacts well under pressure; Treats others with respect and consideration regardless of their status or position; Accepts responsibility for own actions; Follows through on commitments.

Quantity—Meets productivity standards; Completes work in timely manner; Strives to increase productivity; Works quickly.

Safety and Security—Observes safety and security procedures; Determines appropriate action beyond guidelines; Reports potentially unsafe conditions; Uses equipment and materials properly.

The job description for apprentices also includes: "Supervisory Responsibilities: This job usually has no supervisory responsibilities; however, from time to time may directly supervise electricians and carry out responsibilities as an electrician foreman."

Upon receiving the May 8 memorandum and attachments, Switzer again called Savoia. Switzer testified: "I let Sherry know that electrical apprentice was not my classification, was not my understanding of hire, and that I wasn't gonna sign that paperwork." Savoia responded that she would "look into why I was sent that job description."

On June 8, Leslie Sadley, a clerical employee in Savoia's office, sent Switzer another memorandum stating: "You have yet to return your Job Description Acknowledgment [sic] Form to [Savoia]. Please do so as soon as possible." Sadley included another job description acknowledgment form, again with "apprentice electrician" written in as Switzer's job classification. Switzer called Savoia again; not reaching Savoia, Switzer left a voice-mail message "that they had sent me the wrong job description . . . I wasn't gonna sign this and send it back."

On June 26, Sadley sent Switzer another memorandum with two attachments. The topic line of the memorandum was: "Job Description, second mailing." The attachments were another copy of the job description acknowledgement form and another copy of an apprentice's job description. "Apprentice electrician" was again handwritten as Switzer's job classification on the job description acknowledgment form. Switzer again called Savoia and left the same voice-mail message.

In late July, Sadley sent Switzer another memorandum stating: "I talked to [Savoia]. Sorry for the confusion. If this isn't correct, please let me know." Attached was another job description acknowledgement form; this time "electrical foreman" was written in. Attached also was a job description for an electrical foreman. It contains the same "Competency" section that the above-quoted apprentice form contains. Under "Essential Duties and Responsibilities" in the foremen's job description are (in list form):

> Requires working with tools. Plans and lays out wiring and installation of equipment and fixtures such as motors, generators, switches circuit breakers and fuse boxes. Inspects wiring and fixtures for conformance to company specifications or local electrical codes. Studies job schedules and estimates worker hour requirements for completion of job assignment. Interprets company policies to workers and enforces safety regulations. Establishes or adjusts work procedures to meet job schedules. Recommends measures to improve methods, equipment performance, and quality of service. Suggests changes in working conditions and use of equipment to increase efficiency of project or work crew. Analyzes and resolves work problems or assists workers in solving work problems. Initiates or suggests plans to motivate workers to achieve work goals. Maintains time and production records. Estimates, requisitions and inspects materials. Confers with other supervisors to coordinate activities of individual departments. Performs activities of workers supervised. May require doing a working estimate and take-off jointly with the Project Manager. Completes correspondence and forms required by the office; i.e., daily reports, time sheets, safety reports, accident reports, etc. Maintains a productive workforce by ensuring employees are beginning and ending the work shift according to company policy.

The foreman's job description that Sadley sent to Switzer in late July also includes, in a section headed "Supervisory Responsibilities":

> Directly supervises journeyman electricians and apprentice electricians. Carries out supervisory responsibilities in accordance with the organization's policies and applicable laws. Responsibilities include training employees, planning, assigning and directing work; appraising performance; rewarding and disciplining employees; addressing complaints and resolving problems.

Switzer testified that he did not respond to the last memorandum from Sadley because "I questioned whether I should have signed this because I was not performing tasks that this job description gave."

On August 17, Sadley sent Switzer another memo, "RE: Job Description Acknowledgment [sic] Forms." Sadley stated:

> You still have not returned your Job Description Acknowledgment [sic] Form. Attached you will find yet another copy. You must sign the Acknowledgment [sic] and return it to the office ASAP. Keep the job description for your files. Failure to comply with this request will be noted in your personnel file.

Attached were another copy of a job description acknowledgement form for "apprentice electrician" (again handwritten) and another copy of the above-quoted job description for an apprentice electrician. Again Switzer called Savoia and told her that "they had again sent the incorrect job description . . . that wasn't the foreman position I applied for." Savoia replied that the "correct paperwork" would be sent to Switzer.

Switzer testified that, at some later point, Joe Sullivan, the Respondent's safety compliance officer,[14] approached him where he was working at the Respondent's Cardinal Middle School project in Erie. Sullivan handed Switzer another copy of the Respondent's job description acknowledgement form for "foreman" and another copy of the Respondent's job description for foremen. Along with those documents, Sullivan handed Switzer an investigative subpoena ad testificandum from the Board's Pittsburgh Regional Office. The subpoena required Switzer to appear before a Board agent at the Respondent's Erie office on October 16, as part of the investigation of the charges in this case. Attached to the subpoena was a memorandum from Savoia stating: "The union recently filed a charge. We are not sure of all details at this time. An attorney is working [with] the NLRB to file an extension on the date. Hang tight until you hear from me [with] further details."

After giving these documents to Switzer, Sullivan asked Switzer to sign the foreman's job description acknowledgement form. According to Switzer, he examined the form first; Switzer testified: "And I told Joe that the reason I had not signed it was because I was concerned about not performing the task[s] in the job description, and signing something that was not true or accurate."

Sullivan responded to Switzer "that it wasn't that I was signing a piece of paper of the tasks that I was doing, but what I would do in that position." Switzer further testified that, after noticing the subpoena and Savoia's note, he also told Sullivan that, "I wasn't prepared to sign this at all until I find out what the subpoena was about." Switzer did not sign a job description acknowledgement form (for either the position of apprentice or foreman) during his employment with the Respondent. (Sadley, as well as Sullivan, did not testify. Savoia testified, but she did not dispute any of this testimony by Switzer.)

On cross-examination, Switzer admitted that he was "interested in a management position" when he applied to the Respondent, and he agreed that Delon told him that he would first work on some jobs as a journeyman but, at the same time, he would be learning what he needed to know in order to supervise jobs as a foreman-in-charge. Switzer testified, however, that he was never placed with a foreman to learn the paperwork or given such instructions.

ISO is a quality and documentation standards system that Bay Harbour follows. Further on cross-examination, Switzer admitted that, in February, during a second foremen's orientation session in February, he received instructions on how to complete the Respondent's documents under ISO standards, but he denied that he ever completed such documents on a job. Switzer further admitted that, when Sullivan gave a safety section of the orientation meeting, he told those who were newly hired as foremen that "foremen at Bay Harbour were considered to be management representatives responsible for enforcing safety standards on the job."

(2) Milton Zill, the second foreman whom the General Counsel called as a witness, testified that on December 5, he responded to the Respondent's newspaper advertisement and interviewed with Delon. When Delon told Zill that he was hired as a foreman, he also told Zill that he could not "be an organizer" because he was then becoming a part of management. Based on that statement by Delon, the complaint alleges that, in violation of Section 8(a)(1), the Respondent "informed employees that they were forbidden to engage in union organizing activities."

Zill's initial pay as a foreman was $16.50 per hour, plus an additional $1 per hour allowance for travel time. Zill testified that, although he was classified as a foreman, he has never "run any jobs" (i.e., been a foreman-in-charge) for the Respondent. Zill testified that on all jobs that he worked for the Respondent he has worked as a journeyman, using his tools in manual labor and that he did no "foreman work." The Respondent did not contest this testimony.

On examination by the Respondent, Zill identified a copy of a conditional offer of employment for foreman form which he signed on December 8. The form states that it is "conditional upon your ability to physically perform the essential job duties of this position." In a section captioned "Description of Essential Job Duties," the form first has an extensive listing of job duties for foremen; these include the manual-labor jobs (such as pulling wires through conduits, soldering wires, and applying tape or terminal caps) that would normally be classified as journeymen's work (or even apprentices' work, according to the testimony and the forms that Savoia sent to Switzer, as discussed above). The section then recites:

> As a foreman with BHE, you are vested with the authority to recommend hiring and firing of applicants and employees, issue discipline in appropriate circumstances, grant vacation and sick leave and other time off, draft and issue employee performance evaluations (which are used to adjust employee wage rates), direct and assign work and other supervisory responsibilities. You are vested with these duties until such time as you are notified otherwise in writing by the Director of Human Resources or designee of BHE.

[14] See fn. 9.

> Responsible for[15] organizing, supervising and directing the work of the assigned job crew performing electrical work. This includes responsibility for job safety standards and ISO procedures. Responsible for monitoring and documenting the progress of the assigned job including the quality and quantity of work performed by the job crew. Foreman will serve as liaison between job and the General Contractor.

When referred to the quoted paragraphs, Zill agreed that they accurately described what he "understood would be the expectations of a foreman with Bay Harbour."[16]

Zill further testified on examination by the Respondent that, within 2 months of his being hired, he attended two foremen's training sessions which consisted, according to his memory, of mostly safety training and paperwork about "keeping track of what's going on a job." Zill agreed that during the foremen's training meetings, he was told that foremen are responsible for safety on the Respondent's jobs. Zill testified that, although he has never been a foreman who was in charge of one of the Respondent's jobsites, at time of trial he was in charge of an area of Respondent's Medina High School construction project where he had two journeymen subordinate to him. The journeymen were employees of CLC, a temporary employment agency. Zill testified that he has directed the work of those employees and will tell them, without checking with anyone else, to redo work if he thinks it is "done sloppy" because he would be held responsible by the Respondent. Zill testified further: "I figured out what needed to be done. And I had these guys do what they needed to do to try to complete that area of the job to be done." When asked if he could cause a CLC employee to be removed from the area over which he was in charge, Zill replied, "I'm sure I could. I haven't had to." Zill further testified that he has been in charge of one or more employees on sections of other jobs when he was reporting to foremen-in-charge, himself. As such, he has the employees working with him to do, and redo, work.

(3) Stephen Hovanec, the third foreman whom the General Counsel called as his witness, had extensive experience in the electrical industry, including a significant amount of supervisory experience with other employers. On January 16, shortly after he saw the Respondent's newspaper advertisement for "supervisors/foremen," Hovanec went to the Respondent's office and completed an application. Hovanec testified that Delon gave him one written test and, when he finished, Delon gave him another. Delon interrupted Hovanec's taking of the second test by stating that he should stop because he had done so well on the first test. Hovanec testified that then:

> [Delon] told me that I was going to be hired as an industrial foreman in the Cleveland area, and that they would match my [then-current] pay [of $19.50 per hour], and that eventually I would be running jobs, start out with meeting the people in the field, running small jobs at first, but then I would be onto running large jobs.

On January 18, Hovanec attended an orientation meeting, the content of which Hovanec was not asked to describe. (If it was an orientation for supervisors, the fact was not brought out.) Hovanec signed a conditional offer of employment for foreman form on the same date. Hovanec began working for the Respondent on January 22. Hovanec testified that since being hired, he has done only "journeyman electrical work." Specifically, Hovanec testified: "My job duties have been to run pipe, pull wire, devise devices, [and a] small amount of fire alarm work."

Hovanec testified that in mid-May a job description acknowledgment form was sent to his home; in the space for "position" was handwritten "electrical foreman." Attached was the job description for an electrical foreman, as partially quoted above. An accompanying memorandum stated that he was to read it, sign it, and return it to the Respondent's office. Hovanec testified that he did not sign the job description acknowledgement form because: "I read through it and I didn't feel I was doing what the job said to do, so at that time I did not sign it." Hovanec further testified that on October 18, 2000 (after some of the charges herein were filed) Sullivan approached him as he worked at the Respondent's Belden Village project in Canton. Sullivan presented Hovanec with another job description acknowledgement form and another foreman's job description. According to Hovanec:

> He told me I had to sign this.
>
> And I told him I didn't feel comfortable signing it because I didn't feel I was actually fulfilling the job description that was on the pages.
>
> At that time he told me, "This isn't what you should be doing, this is what we expect you to do. You do think you can do the things on this form, don't you, Steve?"
>
> I said, "I can readily do them."
>
> He said, "Well, if you want the chance to do this, if you want the chance to be a foreman, you have to sign this form." And at that time I signed it.

On cross-examination Hovanec agreed that, during his employment interview, Delon offered him "a supervisor's position." Hovanec further agreed that the conditional offer of employment for foreman form that he signed for Sullivan described the position that he wanted when he signed it. Although Hovanec did not run any of the Respondent's jobs, he worked under several different foremen who did. Hovanec agreed that such foremen, were required to: "use a lot of judgment . . . [i]n terms of being able to manage the project successfully to conclusion." Hovanec further agreed that the Respondent's foremen who were in charge of jobs, "make decisions about when to order materials in advance so that the materials get to the job site in a timely basis, . . . make decisions about how to use the crew skills in a way to most efficiently complete the project, . . . [and] assign one person to one area based upon [his] assessment of that person's strengths or weaknesses and assign a different person to another portion of the project based upon [his] assessment of that [other] person's strengths and weaknesses." Hovanec at first argued that a foreman could

[15] This is an exact quote; that is, omitted was any introductory phrase such as "As a foreman with BHE, you are. . . ."

[16] As discussed infra, 9 of the 11 foremen whom the Respondent hired in the November-through-January period signed such forms, Switzer and Gary Kopec being the exceptions.

contact a project manager if there was a problem on his job, but he then agreed that: "The day-to-day operations are the foreman's position."

(Hovanec also agreed that, for one 2-week period, he substituted for his foreman-in-charge, Bob Harris. On brief, the Respondent argues that this period was one in which Hovanec was a foreman-in-charge, himself. Savoia, however, admitted during the presentation of the Respondent's case that Hovanec had never run a job. Savoia would not have made such admission if the Respondent had considered Hovanec's substitution for Harris a period of acting as a foreman-in-charge. Also, Hovanec testified that he had signed a certain order form while substituting for Harris; about a month later, however, Hovanec received a memorandum from the Respondent's office stating that he had to get another signature on the form "because a foreman had to sign it." I shall therefore not consider Hovanec's substitution for Harris further.)

C. Evidence Presented by the Respondent

1. The Respondent's business and hiring practices

In June 2000, in the hope and anticipation of securing more business in Ohio, the Respondent purchased Diamond Electric Company of Cleveland. The Respondent introduced through Dennis McCulah, its director of business development, records that show that it did experience a significant increase in business from August through December 2000. After December 2000, however, business declined sharply; in fact, during the months of February, May, and June 2001, the Respondent was awarded no contracts on which it had previously bid.

The Respondent does not hire any applicant as a journeyman. (In fact, Savoia admitted on cross-examination that the Respondent has, for at least 5 years, maintained in a front window of its Erie facility a sign stating: "Not Accepting Journeymen Applications At This Time.") The Respondent contends that it secures all the journeyman electricians that it needs from its apprenticeship program and from temporary employment agencies. Savoia described an extensive apprentice-training program that the Respondent conducts, and she testified that the reason for the program is: "To train people. To have people become qualified electricians. To create Bay Harbour with a pool of journeymen." Savoia identified records that reflect that, between June 1999 and June 2001, the Respondent's apprentice program graduated 19 individuals. Savoia testified that 17 of those individuals were still employed by the Respondent as of December 31, 2001.[17] When asked specifically why the Respondent had advertised for supervisors and apprentices, but not for journeymen, during October and November, Savoia replied:

> I did not have a need. I was growing my own electricians. We had plenty of people that were graduating from the apprenticeship program and had graduated in previous years. Plus we had just done the purchase with Diamond Electric and they had probably somewhere around 20 electricians that added to the pool at that time.

Savoia further testified that the Respondent also contracts for employees, including journeymen, from temporary employment agencies to avoid having to lay off its own employees between jobs.[18]

Savoia testified that the Respondent operates as many as 20 projects at a time, that each project has a foreman, and that:

> The role of a foreman would be your management representative for the Company, your front line supervisor. They're involved in managing the project from beginning to end to see that the project is brought in within the budget, and brought in to the customer's satisfaction, to ensure the overall safety on the job. . . . [The foremen] ensure the policies and procedures are being followed for safety [and other] policies and procedures [such as] making sure people are coming in at the appropriate time. If there's employee issues, performance issues, attendance issues, for them to pretty much keep them on track, and to train these people, and work with the trades, and coordinate for the schedule, order materials.

Savoia testified that the Respondent considered all foremen to be part of management and that applicants for foremen's positions were told this during the interviewing processes.

Savoia further described a detailed foremen's training process which includes a 2-day indoctrination on topics including foremen's responsibilities for supervising employees and for their safety; the foremen's training also includes cautions against threatening, interrogating, or making promises to employees about their union activities and cautions against surveillance of employees' union activities. Savoia testified that only those who were hired as foremen are given this training.

The Respondent further introduced records that six foremen quit during the period from June 20 through November 19, 2000. Savoia testified that each of those six foremen had supervised crews and "run jobs" (what I have called, and what some witnesses referred to as, foremen-in-charge). Savoia further testified that the Respondent advertised for foremen in November and December 2000, because the Respondent had lost those foremen, because some of the foremen that Diamond had employed were proving unsatisfactory, and because there had appeared to be an upturn in business during that period.

Savoia testified that after all of the foremen had been hired during the November-to-January period, the Respondent's business "crashed" (referring to the contract-failures that were described by McCulah). Savoia testified that, had the Respondent known that its business was going to decline to the extent that it did after the first of 2001, it would not have gone through the process of advertising for, and hiring, the foremen that it did hire.

[17] The clear implication of Savoia's testimony is that all of these 17 individuals are now employed as journeymen, but Savoia did not expressly say that. The General Counsel introduced no evidence to the contrary. (In fact, the record does not disclose how many individuals the Respondent classified as journeymen at relevant times. The CP Exh. 11 lists some individuals as journeymen, but Savoia denied its accuracy, and the personnel files of the individuals were not introduced.)

[18] The General Counsel does not contend that the Respondent unlawfully denied employment to any of the alleged discriminatees by hiring temporary employees.

As previously noted, the Respondent hired 11 individuals as foremen from November 2000 through January 2001. On direct examination, Savoia was referred to 10 of those individuals (Kopec being the exception). Savoia testified that the Respondent intended to use the 10 individuals to whom she referred as supervisors who would run jobs. Savoia acknowledged, however, that 4 of the 10 did not run a job during their tenure with the Respondent; those were Switzer, Zill, Hovanec, and Richard Patalon. Also, if Kopec had run a job, Savoia would have mentioned him as having done so. I therefore find that at least these 5 of the 11 individuals who were hired as foremen during the period from November 2000 through January 2001, had not run a job, as the foreman-in-charge, for the Respondent by time of trial. (Below, I reject the Respondent's contentions and additionally find that Peter Finnell and Michael Rumschlag never became foremen-in-charge of any of its jobs.)

Savoia testified that when Delon told her that Stock had applied, and that he was a union organizer, she told Delon, "[W]ell, it's a conflict of interest for an organizer to be in a supervisory position, and feel free to tell the individual that." Savoia further was asked, and she testified:

> Q. Did the Company consider the IBEW members for foremen positions at Bay Harbour?
> A. No, we did not.
> Q. Why not?
> A. Because it was a conflict of interest.

That is, the Respondent considered all IBEW members to have a debilitating conflict of interest, not just the professional organizer Stock.

On cross-examination, Savoia acknowledged that she received Stock's offers to work as a journeyman or apprentice. When asked why she did not reply to Stock's May offer to accept a journeyman's position, Savoia replied: "He was applying originally for a foreman position, a supervisory position." When first asked why she did not consider Stock for employment as an apprentice when he applied for "any field position . . . an apprentice to a foreman," Savoia replied: "I don't know." When asked again, Savoia replied, "He had already completed the apprenticeship program, I know that." (On March 30, 2001, however, the Respondent hired Joe Kuligowski as an apprentice, even though Kuligowski had already completed an apprenticeship program in North Carolina.)

2. Denial of threats by Chisholm

As previously noted, the Respondent did not call Delon to deny that he told Stock that he would not be considered for hire as a foreman because of his union membership and activities, or to deny that he told a group that included Watkins that the Respondent would "deal" with any hired employee whom it later found to be affiliated with the Union, or to deny that he told Zill that he would not be allowed to engage in union activities after he was hired as a foreman. Nor did the Respondent call Anthony to deny that he engaged in a telephone conversation with Dobrich (which conversation Albano claims to have overheard) in which he (Anthony) stated that the Respondent would not hire Albano directly because of his union membership. The remaining 8(a)(1) allegations of the complaint are that, on December 16 and April 20, Chisholm told Albano that he would not be hired because of his union membership. The Respondent did not call Chisholm to deny Albano's testimony, but it did call Ron Sciarrilli who Albano admitted was present during his exchanges with Chisholm at the Erie Ice Arena.

Sciarrilli, a printing broker in Erie (who has never done business with the Respondent), is a lifelong friend of Chisholm.[19] Sciarrilli testified that he and Chisholm, and their respective wives, have season tickets together at the Erie Ice Arena for the games of the local hockey team. (The Sciarrillis and the Chisholms also take vacations together and otherwise socialize with each other regularly.) Albano also has season tickets, but they are for seats in a section of the arena that is distant from those of the Sciarrillis and the Chisholms. Sciarrilli testified that, during the intermissions of the hockey games, he and Chisholm regularly go to the bar in the concessions area.

Sciarrilli testified that during the 2000–2001 hockey season, from 8 to 10 times, Albano joined him and Chisholm during intermissions at the games. Each time, Albano would ask Chisholm if he could become hired by the Respondent. Each time, Chisholm would tell Albano that he did not do the hiring and that Albano had to file an application to become hired. Sciarrilli testified that he and Chisholm would attempt to steer the conversations away from the topic of Albano's employment because they did not like to "talk shop" at the hockey games.

Sciarrilli flatly denied that Chisholm ever mentioned Delon during the intermissions. Sciarrilli also denied that Chisholm ever said to Albano that Anthony did not like to hire union-affiliated electricians. Sciarrilli further testified that the only time that a union, or Albano's union membership, was mentioned during the conversations at the Erie Ice Arena was toward the end of the season when Albano then asked Chisholm if his union membership was causing him not to be hired by the Respondent. According to Sciarrilli, Chisholm denied that Albano's membership had anything to do with his not being hired.

On cross-examination, Sciarrilli testified that he had not been subpoenaed to testify for the Respondent; Sciarrilli testified that Chisholm called him the night before he (Sciarrilli) testified and asked him to appear.

3. Evidence about disputed supervisors

As previously noted, the Respondent hired 11 individuals as foremen during the November-to-January period; the Respondent contends that all 11 were supervisors under Section 2(11), and the General Counsel denies it. The 11 individuals are: Robert Ockuly, Mark Baron, Michael Rumschlag, Michael Debalski, John Bechhold, John Switzer, Milton Zill, Richard Patalon, Stephen Hovanec, Peter Finnell, and Gary Kopec. As discussed above, the General Counsel called as his witnesses Switzer, Zill, and Hovanec. Neither party called Rumschlag, Patalon, Finnell, or Kopec. The Respondent called Ockuly, Baron, Debalski, and Bechhold.

[19] Sciarrilli has also known Albano for several years and has given him work (not electrical work) from time-to-time.

a. Foremen who testified for the Respondent

(1) Ockuly was employed by the Respondent as a foreman on November 3, and he remained such at time of trial. At the time of hire, Ockuly had extensive supervisory experience in the electrical industry, including having owned his own business. Ockuly testified that in late October he saw in an Ohio newspaper one of the Respondent's advertisements for "supervisors/foremen," and he then called Delon. After discussing Ockuly's experience, Delon invited him for an interview. At the interview, Delon gave Ockuly 3 tests (a "psychological" test about what he would do in hypothetical situations that could arise among subordinates, an electrical code test, and a test on methods and materials). During the following week, Delon called Ockuly and told him that the Respondent wished to hire him first as an independent contractor (under the name of the company that Ockuly had owned) to work with one of the Respondent's foremen at one of its projects. Ockuly agreed and worked from that point as an independent contractor until November 3, when he signed a conditional offer of employment for foreman form and became employed by the Respondent as a foreman at a starting hourly pay rate of $20. (The Respondent's conditional offer of employment for foreman form is partially quoted above in the discussion of Zill's testimony.) Ockuly testified that the form's paragraph that begins with "As a foreman with BHE, you are vested . . .," and the paragraph that begins with "Responsible for . . ." accurately describe what he expected his responsibilities to be as a foreman for the Respondent.

At trial, the General Counsel offered as his Exhibit 42 a summary of the Respondent's records that the Respondent created during the investigation of the charges herein. The summary shows dates of work and the hourly rates of pay of 8 of the 11 individuals who were hired by the Respondent as foremen in the November-to-January period. The eight included individuals are Ockuly, Baron, Rumschlag, Debalski, Bechhold, Switzer, Zill, and Patalon; not mentioned are Hovanec, Finnell, and Kopec. The exhibit begins with the (weekly) pay period ending November 10, 2000, and it ends with the pay period ending October 5, 2001.

The General Counsel's Exhibit 42 reflects that Ockuly began working for the Respondent during the pay period ending on November 10 at the rate of $20 per hour, but he is credited with only 7.5 hours work, and no construction site is mentioned. For the next pay period, ending November 17, Ockuly is credited with working at the Respondent's Staples store-construction project job at $20 per hour. Ockuly remained at that job, at that rate, until the pay period ending December 1 when he was raised to $21. This 5 percent increase reflects the premium that the Respondent pays to foremen-in-charge. Ockuly remained at the Staples project until the pay period ending March 2, when he worked at the Respondent's Target store project where he worked, for rates varying from $21 to $22.50 per hour, until the pay period ending June 29. Ockuly worked at the Wadsworth project during the pay period ending July 6, at a rate of $20 per hour; he was raised to $21 per hour during the pay period ending July 20; and he worked at that rate at Wadsworth until the pay period ending August 10. Ockuly began working at the Respondent's H.H. Gregg site during the pay period ending August 17, at a rate of $22.05 which would reflect the 5 percent premium that the Respondent pays to foremen-in-charge. The General Counsel's Exhibit 42 shows Ockuly continuing at that rate at the H.H. Gregg job through the pay period ending October 5.

Ockuly testified that at the Staples job, he first trained under Lou Wank who was the foreman-in-charge. Wank introduced him to the job's paperwork and procedures; then Ockuly became "the" foreman of the job. (That is, Ockuly became the foreman-in-charge on the Staples job upon succeeding Wank. On some other jobs, as discussed infra, Ockuly was "a" foreman on the job, a subordinate to a foreman-in-charge.) As the foreman-in-charge on the Staples job, Ockuly testified:

> My responsibilities were to, of course, supervise the employees that I had, to stay in contact with the general contractor, to relate with other contractors on where I was in comparison . . . to where they were, to keep the job in budget and on time.

Ockuly testified that the employee complement at the Staples job varied between 6 and 10, and he made recommendations to increase or decrease the number to Chisholm, the project manager; Chisholm followed his recommendations. Ockuly testified that he assigned work to all employees on the jobsite based on his appraisal of "where they were in the electrical trade." Ockuly was also responsible for ordering materials for the job (after the initial supplying had been done by the Respondent's office). As the foreman on the Staples job, Ockuly regularly dealt with the general contractor; Chisholm rarely came to the jobsite.

Ockuly testified that at the Target job he was a foreman under a foreman-in-charge who went unnamed. (That is, Ockuly was not the foreman-in-charge at the Target job, even though he continued to receive $21 per hour when he was on that job.) Ockuly testified that as a subordinate foreman he had a crew, but he was not asked how many employees were on that crew at the time. Ockuly testified that he "was told" that he had the same responsibilities for the crew under him that he did at the Staples job. (Ockuly did not, however, testify who had told him such.)

Ockuly testified that at the Wadsworth School jobsite he was assigned "to give assistance to the foreman," Ryan Pointkowski, who was running the job. (The Respondent classifies Pointkowski as an apprentice.) Ockuly testified that the Wadsworth job had about 11 employees, that he was given a crew of two employees (both journeymen), and that he "felt" that he had the same authorities that he did at Staples. (Ockuly named those employees as Baron and Kopec, both of whom the Respondent contends were supervisors.) On cross-examination, Ockuly agreed that he did not receive the 5 percent wage premium of the foreman-in-charge on the Target and Wadsworth jobs.

Ockuly further testified that when the Gregg project began, he had only 2 employees reporting to him, but the number later grew to 12. Ockuly testified that he had the same responsibilities at the Gregg project that he did at the Target project.

In December 2000, Ockuly underwent a 1-day training session dealing with a foreman's responsibilities in regard to the Respondent's policies, procedures, and paperwork. (At a later

point he had a second 1-day training session on a foreman's responsibilities in regard to safety.) Ockuly testified that one of the forms that he was taught to complete as a foreman-in-charge was a job's "Task Code Sheet." Employees fill out individual task code sheets that describe the work they do on a daily basis. After checking the sheets for accuracy, a foreman-in-charge (as opposed to any subordinate foreman who may be on the job) transfers the individual results to the job's task code sheet. The sheets are used by the Respondent to estimate costs on future jobs. Another form that was the subject of the December training session was the "Jobsite Orientation" form; it is a checklist that a foreman-in-charge goes through when a new employee is assigned to his site, including "Introduce new employee to other employees on site. . . . Quick overview of project. . . . Review smoking policy. . . . Discuss the proper use of tools and equipment." Both the employee and the foreman-in-charge sign the form.[20] Other documents that Ockuly received instructions about during his foreman's training session were the Respondent's "Employee Counseling Notes" form, its "Jobsite Safety Survey" form, and its "Field Day(s) Off Request" form. Ockuly testified that, although he has never issued one of the counseling forms, he was told during a foremen's training session that he had the authority to discipline employees and that he could use the counseling-notes form for that purpose. Ockuly also testified that during the training session he was told that he had the authority to recommend discharge of an employee; Ockuly has never made such a recommendation, but he testified that he felt that any such recommendation from him would be followed by the Respondent's upper management. The safety-survey form is one that Ockuly gives to new employees; it lists things that employees are to watch for to conduct their jobs safely. (Ockuly further testified that "every Monday" he conducts safety meetings on jobs for which he is the foreman-in-charge.) In regard to the days-off form, Ockuly testified that an employee enters a request and, after checking either a box for "Approved" or "Denied," the foreman-in-charge sends the form to the Respondent's office for final disposition. Ockuly testified, however, that time-off requests are sent to the office only to approve or deny "as far as payment," and that only the foreman-in-charge decides whether the employee may take time off.

When the General Counsel's witness Switzer was on cross-examination, he admitted that, when he worked for 2 months on the Respondent's Staples job, Ockuly was the foreman-in-charge and that, as such, he considered Ockuly to be his supervisor. Switzer further admitted that Ockuly assigned and directed his work, that Ockuly was responsible for keeping the employees on the job working, that Ockuly had the authority to make him redo his work, that Ockuly regularly dealt with the general contractor, that the project manager came to the job only "once every 2 weeks or so," and that Ockuly (at least initially) approved time off requests.

When Charging Party Watkins was on cross-examination, he was asked about Ockuly; at the same time, Watkins was also asked about the statuses of Peter Finnell and John Bechhold whom the Respondent also contends were foremen, and supervisors, at relevant times (and whom the General Counsel contends were not supervisors, even if they were designated as foremen). First, Watkins acknowledged that in his pretrial affidavit he stated that he had worked under Ockuly, Finnell and Bechhold when they were foremen-in-charge, "running" jobs. Then Watkins was asked and he testified:

> Q. When you say "running the job," what exactly do you mean?
>
> A. They were the individuals who were assigning job tasks for anybody on the job, ordering in material, turning in time for everybody on the job. If somebody new came to the job they were the ones that showed them where everything was at, and so forth.
>
> Q. Would the foremen assign you work?
>
> A. Yes.
>
> Q. Did you report to those foremen?
>
> A. Yes.
>
> Q. Did you consider these foremen to be your supervisor?
>
> A. On the job.

On redirect examination, the General Counsel did not ask Watkins how he had formed these impressions.

Baron, the second foreman whom the Respondent called as its witness, was hired as a foreman also on November 3. Baron testified that his previous job was as a supervisor for another electrical contractor. For 6 years before that employment, Baron had owned his own electrical contracting business. Baron first applied for a project manager's position with the Respondent in July 2001; Delon and Savoia interviewed him but did not hire him. In late October, when he was unemployed, Baron again contacted Delon who invited Baron for an interview on November 3. (Baron testified on cross-examination that he had not seen any of the Respondent's newspaper advertisements for foremen.) On that date, after more discussions with Delon, Baron signed a "Conditional Offer of Employment for Foremen" form. Baron testified that he understood that, as a foreman for the Respondent, he would have the duties that are listed on the form. (Baron testified on cross-examination that he did not undergo any testing.)

The General Counsel's Exhibit 42 reflects that Baron began the Respondent's Medina High School project during the pay period ending November 17, at $21 per hour. Baron remained at that job, and at that rate, until the pay period ending December 15, when he was sent to the Orange Elementary School project, also at $21 per hour. Baron remained at the Orange Elementary School job until the pay period ending January 26, when he was sent to the Respondent's Streetsboro project at $22.05, reflecting the 5 percent premium that the Respondent pays to foremen-in-charge. Baron continued to work at the Streetsboro project through the pay period ending September 7, at the $22.05 rate (except for short periods when he was sent to

[20] Ockuly testified that he uses the jobsite orientation form as "a foreman," but it is clear that he was referring to occasions when he was acting as a foreman-in-charge of a project, not a subordinate foreman who may also be on the job. Ockuly referred to the foreman-in-charge as "the foreman that had to deal with the paperwork," and I find that all references to the Respondent's forms that he possessed or used on the job were as a foreman-in-charge.

other projects, including Wadsworth, to work at $21 per hour). During the pay period ending September 14, Baron was transferred to the Respondent's H.H. Gregg project, also at the $22.05 rate. According to the General Counsel's Exhibit 42, Baron remained at the Gregg job, at that rate, until the pay period ending October 5.

Baron testified that at the Medina High School project, he was a "subforeman," but the job was "overmanned," and he did only journeymen's work there. Baron also worked "with the tools" at the Respondent's Orange Elementary School project. Baron testified that he was "in charge of an area" and had a crew of "one or two," but he reported to "head foreman" Carl Carnish. Baron testified that if he saw some employee doing something wrong, he would inform Carnish who would take action. Baron testified that, as the foreman-in-charge of the Streetsboro project, he had an average of six employees on his crew, but that number sometimes got as high as eight. Baron testified that Jim Pavlik was the project manager to whom he reported, but he was in contact with Pavlik only "a couple of times a week." When asked to describe his duties as the foreman-in-charge at the Streetsboro project, Baron testified:

> Everything from layout of the job, coordination between our trade, the general contractor, and the other contractors. Attend the job meetings as needed, ordering of materials, ordering of manpower, laying out all the work for the men, the "where and how much and whys" for all aspects of the job, including the daily logbook entries, paperwork that was necessary for our company, as well as the general contractor. . . . Daily safety log checklist that had to be maintained, as well as our quarterly safety checklist, as well as any other safety documents that might be required or apply to what we're doing out there regarding lifts, and whatnot.
>
> Disciplinary action, if necessary. That's about it. . . .

Baron testified that he once asked Pavlik to remove a temporary employee from the Streetsboro job because the employee had not appeared for work for a day-and-a-half. Pavlik did remove the employee. Baron testified that he attended weekly foremen's meetings with the general contractor at which he represented the Respondent. Baron testified that at the H.H. Gregg job he had the same responsibilities that he did at the Streetsboro project. On cross-examination, Baron acknowledged that he worked with his tools "at least 50 to 75 percent" of the time at the Streetsboro project. Baron further testified that at the Medina High School job there were six electricians, including himself and Harry Lathrop, the foreman-in-charge. Baron acknowledged that five of those six electricians were classified by the Respondent as foremen. Baron was further asked and he testified:

> Q. Okay. So other than Harry, the others were not, to your observation, supervising anything; correct?
>
> A. No.

Baron further admitted that at the Wadsworth Elementary School project Pointkowski (who, again, is classified by the Respondent as an apprentice) was the foreman-in-charge.

(2) Debalski, the third foreman whom the Respondent called as its witness, was hired as a foreman on November 16. Debalski had extensive experience in the electrical contracting industry, including a great deal of supervisory experience. After Debalski had undergone an interview and some tests (similar to those described by Ockuly), Delon told him that the Respondent was seeking individuals to be its foremen on projects that it had coming up in Louisiana. AT&T was having built in remote areas of that state several one-story buildings, each of which was to be about 30-by-50 feet. The buildings (which were to be built according to precise AT&T specifications) were to serve as booster stations for AT&T's cell-phone transmissions in the area. The Respondent had contracted to do the wiring of the buildings. (The buildings supported transmission towers, but none of the Respondent's work was on the towers themselves; nevertheless, Debalski often called the projects "cell towers," and the Respondent's witnesses called the projects "cell-tower work.")

The General Counsel's Exhibit 42 reflects that Debalski began working at the Respondent's Governor's Village project, at $19 per hour, during the pay period ending December 1. Debalski remained at that site, at that rate, until the pay period ending December 22, when he was raised to $19.95 per hour. During the pay period ending February 2, Debalski was transferred to the Respondent's Honeywell job, continuing at the $19.95 per hour rate. During the pay period ending February 9, Debalski worked at the same rate at the Respondent's "AT&T Rotterdam, NY" project. During the pay period ending February 16, Debalski worked at several different projects, also at $19.95. During the pay period ending February 23, Debalski began working at the Louisiana projects at $21, which reflects the 5 percent premium for foremen-in-charge (plus 5 cents). Debalski continued in Louisiana, at that rate, through the pay period ending June 15. The exhibit reflects no further employment by Debalski until the pay period ending September 21, during which he began working at the Respondent's Wadsworth job at the $21-per-hour-rate. Debalski continued at Wadsworth until the end of the exhibit's coverage, the pay period ending October 5.

Debalski testified that the Louisiana jobs were not ready to start when he first was employed by the Respondent. Delon sent Debalski immediately to the Respondent's Governor's Island Retirement Home jobsite in Cleveland where he worked for a week doing journeymen's work under Foreman Bob Hoopman. During the next week, Debalski took time off, and then he returned to the Governor's Island project. At some point during the week before Debalski's return to the Governor's Island job, Hoopman became ill. Debalski testified on direct examination that Delon then made him the foreman-in-charge of the job, a position that he held for 2 weeks. On cross-examination, however, Debalski admitted that he served as the foreman for only 1 day before two other individuals came from the Respondent's Erie office to serve as the supervisors on the job. Debalski then returned to doing journeymen's work at Governor's Island.

Debalski remained at the Governor's Island project until he was sent to New York to train in the construction of AT&T booster stations. In February, when Debalski went to Louisiana

to begin working on the stations, he was given a truck, trailer, and the tools that he would need. At the same time, the Respondent also gave Michael Rumschlag, whom it had hired as a foreman on November 10, similar equipment for working on Louisiana booster stations. (As discussed infra, the Respondent contends that Rumschlag, as well as Debalski, was a supervisor; the General Counsel contends that neither Rumschlag nor Debalski was a supervisor.) Debalski and Rumschlag then drove their rigs to Louisiana.

Debalski testified that in Louisiana he and Rumschlag first went together from one station-site to another, laying underground wiring conduits and other underground components. Construction crews (of other employers) came in behind them, poured foundation slabs and assembled the prefabricated buildings. By the time that Debalski and Rumschlag finished the underground electrical work of the last site, the first of the buildings were ready for the above-ground electrical work. At that point, Debalski and Rumschlag split up and went to different groups of buildings to complete the remaining phases of the electrical work that was required.

When Debalski went to a building to do the above-ground electrical work, he notified the Respondent's office of how many employees he would need to work under him. Tim Pastore, the Respondent's project manager, arranged (from the Erie office) for local temporary employment services to send out employees. Debalski testified that he did the ordering of the materials that the employees were to use on the jobs. When asked on direct examination what his "position" at that point was, Debalski replied:

> I was the supervisor. I was the representative for Bay Harbour, and it was my responsibility to complete all work, get all inspections, and pretty much finish the job, and that was my responsibility.
>
> . . . I was over [the employees'] safety. I had the full responsibility and coordinate[d] with other trades. I pretty much had to run the job, basically. . . .
>
> I had the prints and the spec books which I studied. Basically, I had to direct them and get with them in the morning and tell them exactly . . . what we needed to get done for the day. And, basically, I would get with each one of them and, tell them what was required of them, and basically we would go from there.

Debalski testified that, while he was in Louisiana, he had the authority to, and did, tell employees to redo work that was not up to the Respondent's (and AT&T's) specifications; Debalski further testified that he had Pastore replace two employees because of "lack of productivity." Debalski further testified that Pastore only visited the Louisiana sites twice during the period that he was there.

Debalski signed a conditional offer of employment for foreman form on November 16, and he testified that the form accurately described his duties as a foreman for the Respondent. Debalski described a "foreman's training course" that the Respondent gave him after he was hired; the course was similar to that which was described by Ockuly.

Debalski testified that Pastore told him that Rumschlag had the same duties and authorities that he did, but Debalski did not witness what Rumschlag actually did after they finished the underground wiring of the booster stations together. Debalski further testified that Rumschlag left Louisiana after 2 months. Debalski testified that he believed that the Respondent replaced Rumschlag with Finnell, and Debalski testified that he believed that Finnell had the same authorities as Rumschlag, but he did not testify where he got those impressions, and he did not observe what Finnell actually did on the sites that Rumschlag did not finish. (The Respondent contends that Finnell was also a supervisor; the General Counsel denies it.) After Debalski finished his work in Louisiana, he returned to the Ohio area, but he has not been the foreman-in-charge of any more jobs. Debalski's next assignment after Louisiana was working on the Respondent's Wadsworth project in Ohio. Debalski testified that Ryan Pointkowski was the foreman-in-charge on that job. (The Respondent, again, classifies Pointkowski as an apprentice.)

(3) Bechhold, the fourth foreman whom the Respondent called as its witness, was hired as a foreman on December 1. Bechhold had worked in supervisory positions since 1979, including for a time being the owner of his own electrical contracting business. The General Counsel's Exhibit 42 reflects that Bechhold began working at the Respondent's Solon High School project, at $21 per hour, during the pay period ending December 15. During the pay period ending January 5, Bechhold worked at the Visintainer Middle School project, also at $21. During the pay period ending January 12, however, Bechhold was raised to $22.05 per hour at the Visintainer job, reflecting the 5 percent premium that foremen-in-charge receive. With only occasional assignments to other jobs at $21 per hour, Bechhold remained at the Visintainer job, at the $22.05 rate until the pay period ending October 5 (the end of the exhibit). During that pay period, Bechhold also began working at the Respondent's Hilltop job, at $22.05.

At the Solon High School project, Bechhold did journeymen's work under Rick Gagliardo who was the foreman who was "running the job." When Bechhold went to the Visintainer jobsite, he was designated to be the foreman who was "running the job." There were "four to six" electricians on the job; Bechhold testified that, as foreman-in-charge, he met with representatives of the general contractor and other contractors on the job to change and coordinate schedules; he planned the work of his crew for as much as 3 weeks in advance, ordered supplies that would be used, and scheduled the work for each employee for each day. When he needed more, or fewer, employees he called the office and had employees added or removed. When asked what his authority to discipline was, Bechhold replied:

> If I suggest for somebody to wear safety glasses, and they don't wear safety glasses they're going back to the shop. I mean I'm gonna send them back to the office and . . . then if there's any question I'd be more than willing to go into the office and discuss it with somebody. But . . . I've not run across that problem. Most people respect me enough out in the field [that] if there's any kind of a question they'll respond to my suggestions right away.

At the Respondent's Hilltop Gymnasium job, Bechhold has had as many as "four, maybe five" electricians reporting to him, but at time of trial there was only one. Bechhold testified that he has had the same responsibilities at the Hilltop job as he did at the Visintainer project. Between the Visintainer and the Hilltop jobs, and at some points during those jobs when work was slack, he went to other of the Respondent's jobs where he did only journeymen's work because he was not, on those jobs, the foreman-in-charge.

Bechhold identified a conditional offer of employment for foreman form that he signed on the day he was hired, December 1. Bechhold testified that the form accurately described "a part" of what he thought he would be doing as a foreman for the Respondent. Bechhold testified that a foremen's class that he attended was scheduled to be 1 day, but it went into a second; topics such as foremen's paperwork and jobsite safety responsibilities were heavily emphasized.

b. Foremen who did not testify

The Respondent contends that four individuals who did not testify were hired as supervisors during the November-to-January period. Those individuals were Kopec, Rumschlag, Patalon, and Finnell who were hired on November 3 and 8, December 8, and January 18, respectively. (Patalon is still employed by the Respondent; Kopec, Rumschlag, and Finnell are not.) The General Counsel contends that, even if the Respondent did designate these individuals as foremen, they were never supervisors under Section 2(11) and that their hiring (as well as the hiring of the other disputed supervisors) in place of the alleged discriminatees is evidence of unlawful discrimination.

(1) Kopec was not mentioned during the Respondent's presentation of evidence, even though the Respondent agreed during the presentation of the General Counsel's evidence that it had hired Kopec as a foreman,[21] and even though Switzer testified during the General Counsel's case that Kopec had attended a foremen's training session that he (Switzer) had attended. Specifically, the Respondent did not offer any conditional offer of employment for foreman form that Kopec may have signed, and it did not offer any evidence that Kopec was ever a foreman-in-charge of any job (or even a head of a crew under a foreman-in-charge); presumably, if such evidence had existed, the Respondent would have presented it. During cross-examination, the Respondent's witness Ockuly testified that he was once on a job where Pointkowski (who, again, the Respondent classified as an apprentice) was the foreman-in-charge. On that job Kopec was in a three-member crew with Ockuly. When asked specifically if Kopec was there as a foreman, journeyman or apprentice, Ockuly replied, "journeyman."

(2) Rumschlag did sign a conditional offer of employment for foreman form when he was hired on November 10. As noted, Debalski testified that Pastore, the project manager of the Louisiana booster-station projects, told him that Rumschlag was to have the same authority over employees that Debalski had. However, Debalski conceded that he was never present if and when Rumschlag had employees reporting to him. Pastore did not testify. As Rumschlag also did not testify, there is no evidence that he ever exercised any supervisory authority that he may have possessed.

According to the General Counsel's Exhibit 42, Rumschlag began working for the Respondent during the pay period ending November 17; his wage rate was $20 per hour, and he continued at that rate until the pay period ending January 12, when he was raised to $21 per hour for work at projects named "Sprint Boardman Ballfield," "American Tower Nashville," and "American Tower Lewis Run." (Other than the name "Nashville," there is no indication where these projects were located.) Rumschlag's raise from $20 to $21 is 5 percent, but the Respondent does not contend that Rumschlag acted as a supervisor at any time before he went to the Louisiana jobs. Rumschlag went to the Louisiana jobs during the pay period ending February 2, and he continued to be paid $21 per hour. The last entry for Rumschlag in the exhibit is for his work in Louisiana during the pay period ending April 20, when he ceased his employment with the Respondent. (According to the General Counsel's Exhibit 39, Rumschlag resigned on April 13.)

(3) Patalon also signed a conditional offer of employment for foreman form upon his being hired as a foreman on December 8, and he did attend a foremen's training session. The Respondent concedes that Patalon was never a foreman-in-charge of a job; however, it relies on Ockuly's testimony that, when he was foreman-in-charge of the H.H. Gregg job, he placed Patalon in charge of a crew. Ockuly testified that he told Patalon that he had the same authority as head of that crew that he (Ockuly) had over the whole job. Ockuly did not testify how large the crew was, or how long Patalon maintained whatever authority that he invested in Patalon, or that he witnessed Patalon taking any action as supervisor of a crew. Finally, Ockuly testified that Patalon was currently working with him at the Respondent's Topps Grocery Store job where Patalon is a subordinate foreman; neither Ockuly nor Patalon has been the foreman-in-charge of the Topps job.

(4) Finnell, the fourth foreman who did not testify, also signed a conditional offer of employment for foreman form on January 18, and Savoia testified that the Respondent expected him to act for it as a supervisor. As noted, Debalski testified that when Rumschlag left the Louisiana project and returned to Ohio on April 13, Finnell apparently took Rumschlag's place. Debalski testified that he had the impression that Finnell had a crew working under him, but there is no evidence of how Debalski came under that impression. (Again, the Respondent did not call Pastore, the project manager of the Louisiana jobs, to testify.) As quoted above in the discussion of Ockuly, however, the General Counsel's witness Watkins testified that Finnell was once his foreman-in-charge and, as such, Finnell's responsibilities included "assigning job tasks for anybody on the job, ordering in material, turning in time for everybody on the job." Watkins further testified that he reported to Finnell and that he considered Finnell to be his supervisor.

[21] See the GC Exh. 39.

c. The Respondent's evidence about foremen who testified for the General Counsel

As noted, Switzer, Zill, and Hovanec testified for the General Counsel that, although they were told that they were being hired as foremen, they never functioned as supervisors. Savoia testified that the Respondent hired Zill, Switzer, and Hovanec as statutory supervisors but that the downturn in available jobs decreased their opportunities to be a foreman-in-charge of any project. Savoia further testified that Zill had not been, and perhaps would not ever be, a foreman-in-charge because he twice had to be reminded to wear his hard hat, and:

> He didn't display leadership with the safety hard hat, not wanting to wear that. So he wasn't leading by example, and he . . . was involved in a generator blow-up which the owners of the Company were not exactly favorable to that. And, "Will he ever run a job?" Maybe; not at that time. Milton has to pretty much prove himself to be a leader, to have his own job, and run his own job.

Edward Savoia is a foreman; he is an undisputed supervisor who was hired before the events of this case, and he is the husband of Human Resources Director Sherry Savoia. Edward Savoia testified that from January through March, he was the foreman-in-charge at the Respondent's Honeywell project, which job he categorized as an "industrial" job (as opposed to a commercial or residential job). Both Switzer and Hovanec reported to Savoia at that job. (Savoia did not testify that either Switzer or Hovanec had crews that reported directly to them at the Honeywell job.) Savoia testified that Switzer reported to work on two occasions without a hard hat. Savoia further testified that he once assigned Switzer to run a rigid conduit but "he wasn't very good at it." Savoia had an apprentice redo Switzer's conduit work. Edward Savoia did not testify that he told Sherry Savoia these facts; he testified only: "Well, I told her that he was weak." Edward Savoia further testified that Hovanec had insufficient industrial experience to be "on the A-Team" for industrial jobs and that he told Sherry Savoia such.

Sherry Savoia agreed that Edward Savoia gave her these reports about Hovanec and Switzer. She testified that, based on Edward Savoia's reports, the Respondent has concluded that Hovanec "needed some training; he had to gain some further knowledge in the trade" before he could be made a foreman-in-charge of any project. Sherry Savoia did not testify that Edward Savoia's reports about Switzer caused the Respondent not to give him assignments as a foreman-in-charge.[22]

Robert Ockuly (whom the Respondent contends was a supervisor) testified that he had occasionally worked with Switzer on jobsites. Ockuly testified that Switzer appeared disinterested in his work and that he reported that fact to Savoia. The Respondent assigns that alleged disinterest as part of the reason (along with an economic downturn) for never designating Switzer as a foreman-in-charge of any project.

[22] Savoia did not testify that she made the decisions as to which foremen got assignments as foremen-in-charge, but the General Counsel did not object to her testimony about why such assignments were made. If Savoia is an electrician, or if she ever directly supervised electricians' work, no mention thereof was made at trial.

D. Analysis and Conclusions

1. The statuses of the alleged supervisors

The burden of proving that an individual is a supervisor within the meaning of the Act is upon the party that takes that position.[23] The Respondent contends that it has proved that all of the individuals whom it hired as foremen during the November-to-January period were supervisors within Section 2(11). The General Counsel contends that the Respondent has failed to prove that any of them were. I agree completely with neither position.

I find below that the Respondent has shown that it placed 4 individuals in the position of a foreman-in-charge of jobsites and that it thereupon vested those individuals with Section 2(11) authorities. Those individuals are: (1) Ockuly, who was hired on November 3, and became a foreman-in-charge at the Staples job on or about November 24 (the first day of the pay period ending December 1, according to the General Counsel's Exhibit 42); (2) Baron, who was hired on November 3, and became the foreman-in-charge of the Streetsboro job on January 19; (3) Debalski, who was hired on November 16, and became the foreman-in-charge of some of the Louisiana jobs on February 16; and (4) Bechhold, who was hired on December 1, and became the foreman-in-charge of the Visintainer job on January 5. Although the Respondent claims that it made Rumschlag and Finnell foremen-in-charge of various jobs, I find that it has not shown that it did so, and I find that it has not shown that it vested them with any supervisory authorities. Finally, the Respondent does not contend that it made Switzer, Zill, Hovanec, Patalon, and Kopec foremen-in-charge at any point, and I find that the Respondent has not shown that it ever vested them with any Section 2(11) authorities.

a. Those not contended to have been made foremen-in-charge

The Respondent relies heavily on its conditional offer of employment for foreman form as proof that anyone who signed one automatically becomes a supervisor. The cases of Switzer, Zill, and Hovanec immediately defeat that proposition.

The first thing to be noticed about Switzer's hiring as a foreman is that Delon did not offer him a conditional offer of employment for foreman form when he hired him. Then, beginning after 5 months of Switzer's doing only journeyman's work, Savoia repeatedly tendered to him for signing copies of its conditional offer of employment for *apprentice* electrician form and copies of the job description of apprentices. On brief, the Respondent makes no suggestion of why it failed to tender Switzer the foreman's forms when he was hired or why it repeatedly sent him the apprentice's forms. Savoia did not testify that she sent the apprentice's forms to Switzer in error, and Savoia did not send the foreman's job description to Switzer until after the charges were filed herein. (Then, after sending the foreman's job description to Switzer, Savoia again sent him another apprentice's form.)

The apprentice's job description form that Savoia repeatedly sent to Switzer is revealing. It tells apprentices that they are

[23] *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).

responsible for (to name just a few): "Project Management" ("Completes project on time and budget); "Leadership" ("Effectively influences actions and opinions of others; Inspires respect and trust; Accepts feedback from others; Provides vision and inspiration to peers *and subordinates*" (Emphasis supplied.); "Business Acumen," "Ethics" ("Upholds organizational values"); "Attendance/Punctuality" (insuring that "work responsibilities are covered when absent"); and "Planning/Organizing" ("Organizes or schedules other people and their tasks; Develops realistic action plans"). Reading these responsibilities for apprentices, one wonders what responsibilities would be left for supervisors. Then one reads in the apprentice's job description: "Supervisory Responsibilities: This job usually has no supervisory responsibilities; however, from time to time may directly supervise electricians and carry out responsibilities as an electrician foreman." That is, the Respondent considers apprentices to be at least substitute supervisors.[24] Except for this last clause, the "Competency" section of the foremen's job description is identical to that of the apprentices. That is, apprentices and foremen are entirely fungible in the Respondent's system. This would explain why four apprentices had starting wage rates as high as, or higher than, the $16.50 per hour rate that alleged Foremen Switzer and Zill received. (Watkins and Marshall Pennington were paid $16.50; Lawrence Ilench, $18.50; and John Kemmer, $17.50.) On brief, the Respondent makes no attempt to explain how this inverted pay system could exist if the title of "foreman" has any significance.[25] Moreover, Savoia's testimony makes clear that signing the foreman's forms did not make one a supervisor for the Respondent. Zill signed one, but Savoia testified that "Milton has to pretty much prove himself to be a leader, to have his own job, and run his own job." And Hovanec, according to Savoia, "needed some training; he had to gain some further knowledge in the trade" before he could be made a foreman-in-charge of any project. Also, when Sullivan presented the foreman's job description to Hovanec, he told Hovanec, "if you want the chance to be a foreman, you have to sign this form," thus acknowledging that Hovanec had not been a foreman (or supervisor) until that point.

All of which is to say that the Respondent's actions rendered meaningless its "paper authorities" for its foremen.[26]

Switzer and Kopec did not sign conditional offer of employment for foreman forms, and the Respondent does make the argument that they had even paper authority to act as a supervisor. Aside from apparently routine instructions to redo work that they may have issued to lesser-experienced journeymen and to apprentices, paper authority is the only basis for the Respondent's argument that Zill and Hovanec were supervisors. The only evidence, in addition to paper authority, that the Respondent relies upon for the proposition that Patalon was a supervisor is Ockuly's uncorroborated testimony that he put Patalon in charge of an area at each of two projects. Ockuly did not offer testimony that he had been vested with authority by anyone higher in authority than himself to make another employee a supervisor, and Ockuly himself was not even the foreman-in-charge on one of the projects (Topps). Certainly, no supervisor above Ockuly (such as the foreman-in-charge or the project manager) told the employees that Patalon was, somehow, their supervisor. Finally on this point, it is to be noted that, although the Respondent contends that Patalon was, and is, its supervisor, it did not call him to testify. I draw an adverse inference against the Respondent for its failure to do so,[27] and I find that, had the Respondent called Patalon, his testimony would have been inconsistent with the Respondent's position and representations.

In summary, the Respondent has failed to show that Switzer, Zill, Hovanec, Patalon, or Kopec ever possessed authority beyond that of a routine nature; at minimum, it failed to show that those individuals, although designated as foremen, possessed authorities the exercise of which required independent judgment as required by Section 2(11). I therefore find that Switzer, Zill, Hovanec, Patalon, and Kopec, the foremen whom the Respondent does not claim to have ever become foremen-in-charge of any jobs, were never made supervisors within the meaning of the Act.

b. Those found never to have been made foremen-in-charge

The Respondent contends that Rumschlag and Finnell were hired as supervisors, but it called neither to testify, and for its contentions it relies solely on: (1) the discreditable paper authorities that Rumschlag and Finnell signed, (2) the testimonies of Debalski and Savoia, and (3) a seeming admission by Charging Party Watkins.

Debalski testified that Pastore, a project manager who did not testify, told him that Rumschlag had the same authorities that he (Debalski) had on the Louisiana projects. I am not required to rely on this hearsay conclusion, and I do not. Moreover, it is to be noted that Rumschlag did not even receive the 5 percent premium that foremen-in-charge received when he went to Louisiana. And, although the Respondent adduced

[24] The case of Pointkowski shows that the Respondent also considers some apprentices to be regular supervisors, but Pointkowski is not the only one. Several more are listed on the CP Exh. 11. When examined on that exhibit Savoia was asked and she testified:

> Q. So is it your testimony you can be both an apprentice and a foreman at the same time?
>
> A. Yes. At Bay Harbour, you can be, yes.

[25] This is true even though I emphasized the significance of this factor when stated at trial, as I was overruling a series of the Respondent's objections: "Mr. Powell, if all foremen made more money than all apprentices, we wouldn't be doing this." (The General Counsel did not develop whether the Respondent paid any of its journeymen more than Switzer and Zill or whether it paid any of its journeymen more that it paid the remainder of the alleged foremen.)

[26] See *Eventide South*, 239 NLRB 287 fn. 3 (1978), and *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978). To be distinguished are cases that are cited by the Respondent such as *Ohio Power Co. v. NLRB*, 176 F.2d 385, 388 (6th Cir. 1949), where possession of supervisory authorities by certain "control operators" was demonstrated and only "the frequency of their exercise" was questioned. Also to be distinguished is *E. I. du Pont de Nemours & Co.*, 210 NLRB 395, 396 (1974), where the parties stipulated that certain "relief foremen" possessed supervisory authorities and the only question was the significance of the fact that they would not retain those authorities indefinitely.

[27] See the discussion of the principle of *International Automated Machines*, 285 NLRB 1122 (1987), infra.

evidence that foremen-in-charge generated a great deal of paperwork in exercising their authorities (as detailed in the discussion of Ockuly's case), it did not attempt to corroborate Debalski's testimony with any documents that Rumschlag would have generated if he actually had been a foreman-in-charge.

Finnell was hired on January 18, and Debalski testified that Finnell came to Louisiana after Rumschlag resigned on April 13. The Respondent relies on Savoia's testimony that Finnell "was brought in as a foreman . . . to perform as a foreman on the Louisiana cell-tower projects, and he did." This testimony is at least hearsay, and it is probative of nothing. Savoia did not testify that she made the decision to send Finnell to Louisiana, and she did not testify who did make that decision. As well, Savoia concludes that Finnell acted as a foreman, but she did not, and she could not (from her vantage point in Erie), testify that Finnell ever possessed any authorities of a supervisor. Certainly, she did not testify to anything specific that Finnell might have done that would indicate that he possessed supervisory status. And, as in Rumschlag's case, the Respondent made no attempt to corroborate Savoia's testimony by offering some documents that Finnell would have generated if he had actually been a foreman-in-charge. Nor did the Respondent offer the testimony of Pastore to corroborate Savoia's testimony about Finnell, and it did not offer any documentation (or testimony) that Finnell ever received the 5 percent foremen-in-charge wage premium when he was in Louisiana. Watkins did testify that Finnell had been his foreman-in-charge on some unnamed job, but Watkins would necessarily have been referring to a point before Finnell went to Louisiana because Watkins was discharged on April 9 (and, again, Finnell did not go to Louisiana until after April 13). Nevertheless, not even Savoia testified that Finnell was a foreman-in-charge before he went to Louisiana. Savoia assuredly would have done so if Watkins' impression that Finnell had once been his foreman-in-charge had some basis in fact.

I therefore find that the Respondent has not proved that either Rumschlag or Finnell was a supervisor within the meaning of Section 2(11) at any relevant time.

c. Those who were made foremen-in-charge

The Respondent has shown that Ockuly, Baron, Debalski, and Bechhold, at least at some point, each became a foreman-in-charge of one of the Respondent's projects. On the basis of the specific factors that I mention in the immediately following paragraphs, I find that, when these individuals did become foremen-in-charge for the Respondent, they became supervisors within the meaning of Section 2(11).

Ockuly was made a foreman-in-charge at the Staples job on November 24, within a month after he had been hired on November 3. At the time, Ockuly was given a wage increase of 5 percent which reflected the premium that the Respondent paid those who were accepting responsibilities above those of journeymen (and apprentices). Ockuly testified that as the foreman-in-charge of the Staples job he made recommendations to Chisholm when the numbers of employees on that job were to be increased or decreased and that Chisholm followed those recommendations. By recommending that the number of employees on a job be decreased, Ockuly was necessarily exercising the authority to lay off employees, if not to discharge them, within the meaning of Section 2(11). Ockuly further testified that he assigned job tasks to employees on the Staples job based on his estimation of their skill and experience. Chisholm was rarely present, and, as the General Counsel suggests no other person on the job who could have made such assignments, it is clear that Ockuly was assigning work within the meaning of Section 2(11). Although Ockuly never disciplined employees, he was at least given the forms to warn them (the employee counseling notes forms), and this is a strong suggestion that he had the authority to discipline employees within the meaning of Section 2(11). Charging Party Watkins testified that Ockuly was one of the foremen-in-charge who was responsible for "assigning job tasks for anybody on the job, ordering in material, turning in time for everybody on the job." And the General Counsel's witness Switzer admitted that on the Staples job Ockuly assigned and directed his work and was responsible for keeping all other employees at work, as well. Again, project managers were seldom present on the Respondent's projects, and only foremen-in-charge were there to deal with general (and other) contractors, and Switzer admitted it was Ockuly who regularly dealt with the general contractor on behalf of the Respondent at the Staples job. Ockuly testified that he had the same responsibilities at the H.H. Gregg job where he became the foreman-in-charge on August 17.

Baron was made foreman-in-charge at the Streetsboro job on January 19, within about 2-1/2 months after he had been hired on November 3. At the time, Baron was also given the 5 percent premium that the Respondent grants to foremen-in-charge. Baron testified that at the Streetsboro job, he attended weekly foremen's meeting with the general contractor. Baron testified that Pavlik, the project manager, was present only about twice a week, and it was left to Baron to assign all work to the employees, to complete all relevant paperwork, and to discipline the employees as well as to deal with the general contractor. Baron further effectively recommended the discharge (or, at least, transfer) of one employee who had poor attendance.

Debalski was made foreman-in-charge of the Louisiana projects on February 16, 3 months after he had been hired on December 16. At the time, Debalski was also given the 5 percent premium that the Respondent grants to foremen-in-charge. Debalski directed the temporary employees in fulfilling AT&T's precise specifications for the above-ground wiring of the buildings. Pastore, the project manager who visited the Louisiana sites only twice while Debalski was there, discharged or laid off two employees on Debalski's recommendations.

Bechhold was made foreman-in-charge of the Visintainer School project on January 5, about a month after he had been hired on December 1. During the year that Bechhold was the foreman-in-charge at the Visintainer project, he met with representatives of the general contractor and other contractors on the job to change and coordinate schedules, planned the work of his crew for as much as 3 weeks in advance, ordered supplies that would be used, and scheduled the work for each employee for each day. When he needed more, or fewer, employees he called the office and had employees added or removed. Wat-

kins named Bechhold, as well as Ockuly, as one of the foremen-in-charge who had been his supervisor.

The General Counsel disputes none of these facts that are critical to the determination of the statuses of Ockuly, Baron, Debalski, and Bechhold. Nor does the General Counsel dispute his witness Hovanec's testimony that foremen-in-charge "use a lot of judgment . . . [i]n terms of being able to manage the project successfully to conclusion, . . . make decisions about when to order materials in advance so that the materials get to the jobsite in a timely basis, . . . make decisions about how to use the crew skills in a way to most efficiently complete the project, . . . assign one person to one area based upon [his] assessment of that person's strengths or weaknesses, and assign a different person to another portion of the project based upon [his] assessment of that [other] person's strengths and weaknesses." Nor does the General Counsel dispute Hovanec's conclusion that: "The day-to-day operations are the foreman's position." The General Counsel points only to the facts that Ockuly, Baron, Debalski, and Bechhold worked for substantial periods with their tools and that they worked for periods as journeymen on other jobs after they first became foremen-in-charge. The General Counsel cites no case for the proposition that manual labor disqualifies an individual from being a supervisor and, on a construction site, it is not logically impossible for an individual to supervise and work with his hands.

In summary, I find and conclude that the Respondent has proved that Ockuly, Baron, Debalski, and Bechhold became supervisors upon their being designated foremen-in-charge of various projects, but I further find and conclude that the Respondent has not proved that Switzer, Zill, Hovanec, Patalon, Kopec, Rumschlag, or Finnell ever became a supervisor within the meaning of Section 2(11).

2. The alleged threats

The Respondent contends that nothing that its agents said to the alleged discriminatees and Albano could have violated Section 8(a)(1) because all of those witnesses testified that they were applying for foremen's jobs and those jobs were supervisory. In making this argument, the Respondent ignores the testimony of Stock that he initially applied for a journeyman's job as well as a foreman's job[28] and that he later applied for an apprentice's job. Moreover, as I have found above, some (in fact, the majority) of the foremen's positions that the Respondent was filling in the November-to-January period were nonsupervisory. Also, a layman's testimony that he was applying for a "foreman's" position, or even a "supervisor's" position, does not require the inference that he would have accepted a job only if he was to be given at least one of the authorities enumerated by Section 2(11). Without admissions or other evidence that the applicants required such authority as a condition precedent to accepting employment with the Respondent, I would not find that they would only have accepted positions as statutory supervisors. Nor is the Respondent to be excused on all counts because the applicants may have told Delon or Savoia that they were looking for "a foreman's position" or "a supervisor's position." The Respondent had advertised for "supervisors/foremen," and applicants can only be expected to pattern their phraseology to be consistent with what a prospective employer says that it is looking for. Again, it is the nature of the job, supervisory or nonsupervisory, that determines the issue. I therefore conclude that the applicants were employees who were protected by Section 7 of the Act and that the Respondent was not free to coerce them in violation of Section 8(a)(1).

a. Threats by Delon and Savoia

Charging Party Watkins did not apply for one of the advertised "supervisors/foremen" positions; Watkins applied for a journeyman's position, and the Respondent hired him as an apprentice. On December 29, Delon conducted an employee orientation meeting that Watkins attended. Watkins testified that during that meeting Delon "stated that Bay Harbour was a nonunion company and always would be a nonunion company. If anybody was a salt, organizer, or otherwise affiliated with the Union, they would find out about it and deal with it at that time." Because Delon did not testify, this testimony is not disputed,[29] and I found it credible. I agree with the General Counsel that Delon's statement that the Respondent would "deal" with any employee who was found to be affiliated with the Union was a threat of unspecified reprisals against any such employee. I therefore conclude that by Delon's threat the Respondent violated Section 8(a)(1).[30]

On December 5, when Delon told Zill that he was hired as a foreman, he also told Zill that he could not "be an organizer" because he was then becoming a part of management. As I have found, Zill was not hired as a supervisor; he was hired as an employee. Telling an employee, or an employee-applicant, that he has been hired but that he may not be an organizer is an instruction against his engaging in union activities during his tenure of employment. As such, it is a violation of Section 8(a)(1), as I find and conclude.

On January 31, when Albano was being interviewed by Delon and Savoia, Savoia told him that "when the Union guys come here they take our men away from us." Delon did not testify; Savoia testified, but she did not deny making this remark, and I found Albano's testimony on the point to be credible. The complaint alleges that by Savoia's remark the Respondent violated Section 8(a)(1) because Savoia therein informed an applicant that the Respondent "was opposed to hiring union-affiliated employees." Section 8(c) provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Savoia's

[28] As well as placing the term "electrician/foreman" on the resume that he faxed to Delon on November 7, Stock testified that he told Delon on December 1, that he was "just looking for a job as an electrician."

[29] Contrary to the Respondent's assertion on brief, there is no factual denial Savoia's testimony that neither she nor Delon would have made such a threat. Savoia was not present when Delon spoke at Watkins' orientation meeting.

[30] *H. B. Zachry Co.*, 332 NLRB 1178 (2000) (threat of unspecified reprisals to tell employees that "there better not be any union organizers out there" among some already-hired employees or the employer would have "ways of getting around it.").

statement to Albano was clearly an expression of animus toward union applicants, but the issue raised by the complaint is whether it was also a violation of Section 8(a)(1) because it contained a threat. Certainly, a law-abiding employer may be opposed to employing union-affiliated applicants, and he may say so unless he additionally threatens such applicants. This is because such a statement, standing alone, leaves open the possibility that the employer will, despite his contrary inclinations, comply with the law and either hire the prounion applicant or refuse to employ him or her only for nondiscriminatory reasons. Unless that employer effectively tells an applicant that he *will not* hire him because of his union affiliation, however, the employer does not threaten that applicant within Section 8(a)(1). I shall therefore recommend dismissal of this allegation of the complaint.

According to Stock's undenied and credible testimony, on December 1, after he had filed a resume with the Respondent stating that he was a professional union organizer, Delon told him that he would not be considered for employment because he was a union organizer. Even if applicants are also paid union organizers, they are employees within the meaning of Section 2(3) of the Act.[31] As I have found above, some of the foremen's jobs that the Respondent was seeking to fill were supervisory, but most were not. Because Stock was applying for a job that was not necessarily that of a supervisor within Section 2(11), Delon's statement was a threat not to hire Stock as an employee because of his affiliation with the Union. And by that statement the Respondent violated Section 8(a)(1).[32]

b. Threats by Chisholm

Albano testified that on December 16, the Respondent's Project Manager Chisholm told him that Anthony, the Respondent's president, "don't like to hire union electricians" and that "I don't think they'd hire you because you're a union electrician." The complaint alleges that by these statements the Respondent violated Section 8(a)(1) because Chisholm therein "informed a job applicant that Respondent preferred not to hire applicants who are union affiliated." Albano further testified that on April 25, Chisholm told him that the Respondent "won't hire me because I'm a union electrician, directly to Bay Harbour." The complaint alleges that by this statement the Respondent also violated Section 8(a)(1) because Chisholm therein "informed a job applicant he had not been hired because he was affiliated with the Union." The Respondent did not call Chisholm to deny either statement, but it did call Sciarrilli who was present on both occasions and who denied that Chisholm made either remark.

On the witness stand, Albano was not impressive. On direct examination he was hesitant or occasionally had to be led, and on cross-examination he was sometimes evasive or argumentative. Sciarrilli, however, was an assured witness who maintained a plausible demeanor at all times. Nevertheless, I cannot ignore the fact that the Respondent did not call Chisholm whom it currently employs as a manager. The Respondent offered no reason at trial for not calling Chisholm, and it suggests none on brief. Sciarrilli testified that, the night before he appeared, Chisholm asked him to testify. The Respondent, however, did not ask Sciarrilli if Chisholm was ill or otherwise physically unable to appear himself. If Sciarrilli had known of any justifiable reason that Chisholm was not there himself, the Respondent assuredly would have asked. (Even if the question necessarily would have called for hearsay, the General Counsel may not have objected.) Nor was there any inquiry of why Sciarrilli was willing to come all the way from Erie to Cleveland to testify when Chisholm, himself, was not willing to do so. (After all, Sciarrilli owns his own business; his absence for nonproductive reasons was probably not without its negative impact on that business.) Of course, if Chisholm had been physically unable to appear, the Respondent would have offered a physician's testimony, or at least a statement, to prove the fact.

The question therefore becomes whether I should draw an adverse inference against the Respondent for its failure to call Chisholm as its witness. As stated in *International Automated Machines*, 285 NLRB 1122 (1987):

> Thus, while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of management[] and it supports the judge's findings on the issues on which Davis' [the missing manager's] testimony would have been probative.

Chisholm is in upper management (being above all foremen-in-charge), and the Respondent would have had every confidence that he would have supported its position, unless Chisholm had told the Respondent otherwise. I therefore draw the strongest adverse inference against the Respondent for its failure to call Chisholm to testify, and I credit Albano.[33]

Chisholm's December 16 statement to Albano that Anthony "don't like to hire union electricians," standing alone, would be clear evidence of antiunion animus against applicants who are members of labor organizations.[34] Chisholm's addition to that statement that "I don't think they'd hire you because you're a union electrician," however, elevated the statement of animus to a threat in violation of Section 8(a)(1) to refuse to hire Albano because of his union membership. Also Chisholm's telling Albano on April 25, that the Respondent "won't" hire him because he was a union-affiliated employee was an unabashed threat in violation of Section 8(a)(1).

c. Threat by Anthony

Albano further testified that on April 24, he overheard a telephone conversation between residential contractor Dobrich and Anthony. In that conversation, according to Albano, Dobrich told Anthony, "I have a friend of mine sitting here . . . Vinnie Albano. He's looking for work. . . . He's [a] union electri-

[31] *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

[32] *H. B. Zachry Co.,* supra at 110 (threat to applicant that the employer was not offering any job applications because "the Union had been out there the day before" violated Section 8(a)(1)).

[33] There is the strongest suspicion that, although Chisholm was not willing to lie under oath himself, he knew that Sciarrilli would.

[34] *NLRB v. FES*, 301 F.3d 83 (3d Cir. 2002) (stating that the employer is "not interested" in hiring union applicants is evidence of unlawful animus toward union-affiliated applicants, even if it is not an independent violation of Section 8(a)(1)).

cian." Then Anthony told Dobrich that the Respondent would not hire Albano "directly" because "he's a union electrician." Anthony further told Dobrich to hire Albano himself and subcontract him to work at one of the Respondent's projects. And that is what happened. Albano did go to work for Dobrich at one of the Respondent's projects, and he remained until Dobrich told him that Savoia had said to get rid of him (shortly after Albano wore a union T-shirt to work).

The Respondent did not present Anthony to deny Albano's testimony about the telephone conversation between him and Dobrich, and I found Albano's testimony about the conversation to be credible. The Respondent argues that Anthony would have had no reason to believe that Albano could hear his remarks and that, because of that factor, no violation can be found in Anthony's statement that he would not hire Albano "directly" because he was a union member. This argument is nothing more than one that no violation can be found because Anthony could not have intended that Albano hear his remarks. Intent is not an issue in determining whether an employer's statement violates Section 8(a)(1); the issue is the tendency of the statement to interfere with the free exercise of employee rights.[35] Moreover, Anthony had every reason to believe that Albano was listening. Dobrich told Anthony that Albano was (1) "a friend of mine" and that he was (2) "sitting here." Because Dobrich told Anthony that Albano was "sitting here," Anthony necessarily knew that all Dobrich had to do was to hold the telephone at an angle for Albano to hear what he (Anthony) was going to say. Because Dobrich had told Anthony that Albano was "a friend of mine," Anthony would have had every reason to believe that Dobrich would do exactly that. And, even if it did not occur to Anthony that Albano could hear both sides of the conversation, he had every reason to believe that Dobrich would immediately repeat to Albano (again, his "friend") whatever Anthony said to Dobrich. The Respondent's defense is therefore factually, as well as legally, insufficient. I therefore find and conclude that, by Anthony's statement that he would not hire Albano (directly or otherwise) "because he's a union electrician," the Respondent violated Section 8(a)(1) because such a statement is a threat not to hire employees because of their protected union activities.[36]

3. The alleged unlawful refusals to consider and hire

The complaint alleges that the Respondent, in violation of Section 8(a)(3), refused to consider for hire, and refused to hire, the nine alleged discriminatees. Through Savoia's testimony and by its statements on brief, the Respondent admits that it refused to consider any of the alleged discriminatees whom it knew to have union affiliations and that it did so because of those affiliations.[37] The Respondent attempts to defend its refusals on the ground that all of the positions for which the alleged discriminatees applied were those of foremen who were supervisors within Section 2(11). I have rejected that contention and found that at least some of the foremen's positions that the Respondent filled in the November-to-January period were nonsupervisory. Therefore, the Respondent's admissions that it refused to consider the alleged discriminatees for employment are tantamount to admissions of violations of Section 8(a)(3), at least in the cases of those who were known by the Respondent to have had union affiliations. The remaining issue, therefore, is whether the Respondent, also in violation of Section 8(a)(3), refused to hire the alleged discriminatees.

The Board in *FES*,[38] held that to establish a prima facie Section 8(a)(3) refusal-to-hire violation the General Counsel must establish the following elements:(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Once these elements are established, the burden shifts to the Respondent to prove that it would have refused to hire the alleged discriminatees, even absent their known prounion sympathies or affiliations.[39]

(1) As the Respondent advertised, and as it admitted at trial, it had concrete plans to hire, at least during the November-to-January period.[40] (2) I have found that at least some of the positions to be filled were those of nonsupervisory journeymen electricians, and it is undisputed that all of the alleged discriminatees had experience relevant to those positions. (3) I do not find that evidence of antiunion animus exists in the Respondent's handbook's statement, and in various statements by Savoia, that the Respondent would use "all lawful means" to keep a union out. The General Counsel cites no authority for the proposition that such statements do constitute evidence of relevant animus, and I feel that, if anything, these are expressions that the Respondent will comply with the law. Evidence of antiunion animus that contributed to the Respondent's decisions not to hire the alleged discriminatees (at least those known or suspected by the Respondent to have union affiliations) is, however, clear from evidence of: (a) the admitted refusal-to-consider violations;[41] (b) the threat by Anthony to Albano that

[35] See, for example, *Hillhaven Rehabilitation Center*, 325 NLRB 202, 204 (1997) (impact of a posted notice is the critical inquiry, not the employer's intent).

[36] See *Starcon, Inc.*, 323 NLRB 977 (1997) (threat that employer "couldn't hire direct[ly] because he had all that union organizing trouble" violated Section 8(a)(1)).

[37] Again, Savoia testified that it would have been a "conflict of interest" if the Respondent had hired any union members (not just Stock). On brief, p. 48, the Respondent states: "The undisputed evidence establishes that Bay Harbour was hiring foremen during the relevant time period and that its foremen are supervisors under the Act. Under Board precedent, Bay Harbour therefore was not prohibited from rejecting union affiliated applicants for supervisory positions." (Also, see counsel's record statement that is quoted at fn. 3.)

[38] 331 NLRB 9, 12 (2000).

[39] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[40] Until the last paragraph of this section, when I discuss the May and June reapplications of Hudson and Stock, I am referring to the Respondent's actions during the November-to-January period.

[41] *Watkins Engineers & Constructors, Inc.*, 333 NLRB 818, 819 (2001).

he would not be hired because of his union affiliation; (c) the threats by Chisholm to Albano that he would not be hired because of his union affiliation; (d) the threat by Delon to Stock that he would not be hired because of his union affiliation; (e) the threat by Delon that the Respondent would "deal" with Watkins or any other employees if it discovered their union affiliations after they were hired; (f) the instruction not to engage in union activities that Delon issued to Zill (who was being hired for a nonsupervisory position); (g) the expressions of animus by Chisholm and Savoia to Albano that the Respondent did not wish to hire union-affiliated applicants; (h) the showing of the film, "Little Card, Big Trouble," which, according to Watkins' unchallenged testimony, "was telling you that if you signed a union card for representation that it would end up being nothing but trouble for you and the Company." (And the theme of the video, according to Switzer's unchallenged testimony, was that union authorization cards caused troubles between employees who did, and did not, sign them.) The General Counsel has, therefore, established prima facie cases of unlawful discrimination against the applicants who were known by the Respondent to be affiliated with the Union.

I find that the General Counsel has not proved prima facie violations in the Respondent's refusals to consider and hire four of the alleged discriminatees because the General Counsel did not show that the Respondent knew that they had union affiliations: (1) Beltz testified that in November he told Delon that he had been employed by Hersh. Beltz testified (without corroboration) that Hersh was a union contractor in Cleveland, but he did not testify that he told Delon that Hersh was a union contractor, and he admitted on cross-examination that he did not know how Delon, whose office is in Erie, could have known that Hersh was a union contractor. (2) Beltz testified that on November 7 he called Delon stating that he was working for Loomis, but, like Beltz, he did not tell Delon that Loomis was a union contractor or otherwise identify himself as a union member. (3) Hudson testified that in November he called Delon's voice mail several times, but he did not testify that he mentioned the Union. (4) Tersigni spoke to Delon in early November, and later in November he left two voice mails with Delon's office. In none of these communications, however, did Tersigni mention that he was somehow affiliated with the Union. I shall therefore recommend dismissal of the refusal-to-consider allegations, and dismissal of the refusal-to-hire allegations, as they relate to these four individuals.

The General Counsel has, however, proved that the Respondent knew that five of the nine of the alleged discriminatees had union affiliations or sympathies when the Respondent refused to consider and hire them during the November-to-January period: (1) On November 6, Stock told Delon that he was then working "out of Local Union 306." (2) On November 29, Aikey told Delon that he got his training with the IBEW, and within the following week Aikey faxed a resume to Delon that stated, in bold-faced type, that his "Experience" was partially with the IBEW. (3) Also on November 29, Kammer e-mailed his resume to the Respondent stating, inter alia, that his "Experience" included "working out of IBEW Local 306," and twice within the next 2 weeks Kammer called Delon's voice mail, each time stating that he was "with" the Union. (4) On December 10, Sallaz sent Delon a resume stating that he had been a member of Local 306 since 1994. (5) On December 15 and 16, Stefano called Delon stating that he was "an unemployed IBEW member." I therefore find that the General Counsel has stated a prima facie case of discrimination against these five known union adherents, and the burden has shifted to the Respondent to show that it would have refused to consider or hire them, even absent their prounion sympathies.

The Respondent attempts to defend its refusals to hire known union adherents Stock, Aikey, Kammer, Stefano, and Sallaz on the ground that the positions for which they applied were supervisory. Again, the Respondent had the right to discriminate against applicants for *true* supervisory positions, and it proved that the positions for which it hired Ockuly, Baron, Debalski, and Bechhold were actually supervisory. Therefore, the acts of hiring these four individuals do not constitute evidence of unlawful discrimination against the five known prounion applicants. Also, the Respondent hired Kopec on November 3, before any of the alleged discriminatees applied and made their union affiliations known, and his hiring is also not evidence of discrimination against the known union adherents.[42]

The Respondent considered and hired nonunion applicants for nonsupervisory positions after it refused consideration and employment to the known union adherents. In the context of its above-demonstrated animus, the Respondent's selections of the nonunion applicants constitute probative evidence of unlawful discrimination against the five known union adherents. (1) After Stock applied for employment and made known his union affiliation on November 6, the Respondent hired: (a) Rumschlag on November 10; (b) Switzer on December 1; (c) Zill on December 8; (d) Patalon on December 8; (e) Hovanec on January 18; and (f) Finnell on January 18. (2) and (3) After Aikey and Kammer applied and made known their union affiliations on November 29, the Respondent hired Switzer, Zill, Patalon, Hovanec, and Finnell. (4) After Sallaz applied and made known his union affiliation on December 10, the Respondent hired Hovanec and Finnell. (5) The Respondent also hired Hovanec and Finnell after Stefano applied and made known his union affiliation on December 15. The Respondent has not come forward with any evidence (except for that consistent with its discredited supervisory-positions theory) of why it hired the nonunion Rumschlag, Switzer, Zill, Hovanec, Patalon, and Finnell rather than the union-affiliated Stock, Aikey, Kammer, Sallaz, and Stefano.

The Respondent does contend that, even if it never did make Switzer, Zill, Hovanec, Patalon, Kopec, Rumschlag, or Finnell foremen-in-charge, it hired them with the intent of doing so and that it was prevented from doing so only because of its business decline that began in January 2001. For this reason, the Respondent argues, the evidence of its hiring Rumschlag, Switzer, Zill, Hovanec, Patalon, and Finnell (as well as the evidence of its hiring of Ockuly, Baron, Debalski, and Bechhold) cannot be considered evidence of discrimination against Stock, Aikey,

[42] Ockuly and Baron also were hired on November 3, and their hiring is not evidence of discrimination against the alleged discriminatees for that reason, as well the fact that they were hired for true supervisory positions.

Kammer, Sallaz or Stefano. I disagree. Availability of jobs is always a factor in determining how many supervisors, or employees, are needed. However, the Respondent's testimony that Switzer, Zill, and Hovanec had more to prove before they could become foremen-in-charge is an admission that the Respondent hired its foremen subject to conditions subsequent in addition to the availability of jobs. Moreover, if the Respondent's position is held to be a defense, any antiunion employer could have any number of applicants sign meaningless documentation, and run them through any number of "supervisory training sessions," to create a bottomless pool of putative "potential supervisors" that will indefinitely do only journeymen's work. If given such an open-ended right, those employers could evade the legal necessity of considering any prounion applicants who may appear (or who have already appeared). I find that the Respondent is precisely such an employer, and I reject this defense.

In summary, the Respondent has failed to meet its burden under *Wright Line* to show that it would have refused to hire Stock, Aikey, Kammer, Sallaz, and Stefano even absent their known union memberships or prounion sympathies.[43] Accordingly, I find and conclude that the Respondent has violated Section 8(a)(3) by refusing to hire those employees, as well as by refusing to consider them for hire.

The Respondent also refused to consider Stock's June applications to work as an apprentice, and it did hire other apprentices after June.[44] Savoia, after much revealing hesitation, ventured that the Respondent did not hire Stock as an apprentice because he had already completed an apprenticeship program. Savoia admitted, however, that on March 30, Kuligowski was hired as an apprentice, even though he had completed an apprenticeship program. On brief, the Respondent asserts that it hired Kuligowski as an apprentice but "excused" him from entering the Respondent's apprentice program "because he felt that he was a journeyman already." Obviously, however, Stock "felt" the same. Presumably, Stock would have accepted an apprentice's position, also without going through the program, but for the Respondent's refusal to consider him. I therefore also find and conclude that the Respondent also violated Section 8(a)(3) by refusing to consider and hire Stock when he reapplied for employment in June 2001.[45]

On June 8, Hudson appeared at the Respondent's office to make a reapplication with Savoia; at the time Hudson was wearing a union T-shirt. At that point, the Respondent became aware of Hudson's union membership or sympathies, and the complaint alleges that Hudson's reapplication was then denied in violation of Section 8(a)(3). The General Counsel, however, has not proved that the Respondent sought to hire, or did hire, any journeymen after it refused employment to Hudson, either by the artifice of subcontracting for journeymen (as it subcontracted for Albano through Dobrich), or by hiring employees through a temporary employment agency,[46] or by hiring another nonsupervisory foreman. I shall therefore recommend dismissal of the complaint's allegations that it refused to hire Hudson as a journeyman when he reapplied for employment.

In conclusion, I am constrained to note that it is apparent why the Respondent permanently maintains at its facility a sign stating "Not Accepting Journeymen Applications At This Time," and it is apparent why the Respondent advertises only for "Supervisors/Foremen" and apprentices. The Respondent knows that it may lawfully discriminate against union-affiliated journeymen who are applying for *true* supervisory positions, and it knows that no union would use an apprentice as a salt (and thereby interrupt that apprentice's on-going, multiyear, union apprenticeship program). This also explains why the Respondent classifies so many of its journeymen as "foremen," and calls them "supervisors,"[47] and it explains why it classifies other new-hires as "apprentices" (such as journeyman Watkins and sometimes-foreman-in-charge Pointkowski). That is, the Respondent calls newly hired journeymen anything but "journeymen" as a part of a cynical subterfuge of the law. Therefore, even without the proof of the Respondent's animus, I would find the Respondent's claim never to hire journeymen is presumptive evidence of unlawful discrimination against union-affiliated journeymen who may apply for employment.[48]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

[43] On brief, the Respondent raises additional defenses such as the fact that Aikey once expressed a desire for higher pay than the Respondent was granting to foreman, the fact that Sallaz once expressed a desire to work in the Southwest, and the fact that Stock (like Switzer) had no supervisory experience. Savoia, however, did not testify that such factors entered into the Respondent's decisional processes. Savoia did give as reason for not hiring Stock as a journeyman (in addition to his union membership) that he had originally applied for a foreman's position; this reason was so patently false that the Respondent does not mention it on brief.

[44] According to the R. Exh. 55, it hired as apprentices: Thomas Holman on June 22, Douglas Hartley on July 29, and Clinton Klimek and Franklin Robinson on August 10.

[45] This conclusion will affect the remedy for Stock only if the Respondent demonstrates at the compliance stage of this case that he would have been lawfully laid off as a journeyman before he applied for a job as an apprentice.

[46] The General Counsel does not contend that the Respondent hired any temporary employees in preference to any of the alleged discriminatees. I therefore need not pass on the possible adequacy of the Respondent's alleged preference for temporary employees as a defense to an allegation of unlawful discrimination.

[47] Although it may be theoretically possible for a construction-industry employer to operate its business by hiring only apprentices and true supervisors, the Respondent has simply been unable to do so. The extreme example of the Respondent's inability to rely on the graduates of its apprenticeship program to avoid hiring new journeymen lies in the case of its Medina High School job where, as Baron admitted, the Respondent employed six electricians, five of whom the Respondent had classified as foremen. (Baron further admitted that only Lathrop, the foreman-in-charge, supervised anyone but himself.)

[48] See, generally, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963); and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), as cited by the General Counsel on brief. And, specifically, see *Aztech Electric Co.*, 335 NLRB 260 (2001) (system designed to deny employment to prounion applicants is inherently destructive of employee rights).

3. The Respondent violated Section 8(a)(1) of the Act by instructing employees not to engage in activities on behalf of the Union, by threatening them with unspecified reprisals if they did engage in such activities, and by threatening employee-applicants that they would not be considered for hire, or hired, because of their memberships in, support for, or activities on behalf of the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire, and by refusing to consider for hire, employee-applicants Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano, and Stephen Stock because of their memberships in, support for, or activities on behalf of the Union.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices. I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its discriminatory refusals to hire employee-applicants Aikey, Kammer, Sallaz, Stefano, and Stock, the Respondent shall be ordered to, within 14 days from the date of the Order, offer them employment to the positions for which they would have been hired but for its unlawful conduct. Further, the Respondent will be required to make Aikey, Kammer, Sallaz, Stefano, and Stock whole for any loss of earnings and other benefits that they have suffered as a result of the discrimination against them in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be required to, within 14 days from the date of the Order, remove from its files any reference to its unlawful refusals to hire, and to its unlawful refusals to consider for hire, Aikey, Kammer, Sallaz, Stefano, and Stock, and to, within 3 days thereafter, notify them in writing that it has done so and that the actions taken against them will not be used against them in any way. Finally, the Respondent will be ordered to post an appropriate notice to employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[49]

ORDER

The Respondent, Bay Harbour Electric, Inc., Erie, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to engage in activities on behalf of the Union.

(b) Threatening employees with unspecified reprisals if they become or remain members of the Union or give any assistance or support to it.

(c) Threatening any employee-applicant that he or she would not be considered for hire, or hired, because of his or her membership in, support for, or activities on behalf of the Union.

(d) Refusing to hire, or refusing to consider for hire, any applicant for a nonsupervisory position because of his or her membership in, support for, or activities on behalf of the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano and Stephen Stock instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make whole, with interest, Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano and Stephen Stock for any loss of earnings and other benefits that they have suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Order, remove from its files any reference to its unlawful refusals to hire, and to its unlawful refusals to consider for hire, Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano, and Stephen Stock, and within 3 days thereafter notify them in writing that this has been done and that neither its refusals to hire them, nor its refusals to consider them for hiring, will be used against them in any way.

(d) Preserve and, within 14 days of a request, or within such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Erie, Pennsylvania facility copies of the attached notice marked "Appendix."[50] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

[49] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[50] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since November 6, 2000, the date of the first unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT instruct you not to engage in activities on behalf of International Brotherhood of Electrical Workers, Local No. 306, AFL–CIO, CLC (the Union).

WE WILL NOT threaten you with unspecified reprisals if you become or remain members of the Union or give any assistance or support to it.

WE WILL NOT threaten any applicant for a nonsupervisory position that he or she will not be considered for hire, or hired, because of his or her membership in, support for, or activities on behalf of the Union.

WE WILL NOT refuse to hire, and WE WILL NOT refuse to consider for hire, any applicant for a nonsupervisory position because of his or her membership in, support for, or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days of the date of the Board's Order, offer Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano, and Stephen Stock instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make whole, with interest, Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano, and Stephen Stock for any loss of earnings and other benefits that they have suffered as a result of our unlawful discrimination against them, with interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to our unlawful refusals to hire, or to our unlawful refusals to consider for hire, Richard Aikey, Michael Kammer, Robert Sallaz, Paul Stefano, and Stephen Stock, and, within 3 days thereafter, notify them in writing that neither our refusals to hire them, nor our refusals to consider them for hire, will be used against them in any way.

BAY HARBOUR ELECTRIC, INC.